TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 177.

ANDREW J. DAVIS AND CALEB GILBERT, APPELLANTS,

vs.

SARAH J. FREDERICKS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED APRIL 19, 1879.

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1 In first judicial district court, in and for the county of Gallatin, Territory of Montana.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT ET al., defendants.

Be it remembered, that on the 24th day of October, A. D. 1876, the defendant Davis filed his motion to suppress the deposition of W. H. Myers, taken in the cause on part of the plaintiff, which motion is as follows:

TERRITORY OF MONTANA,
County of Gallatin:

In the first judicial district.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS, CALEB GILBERT, AND W. A. Fredericks, defendants.

Now comes the defendant Davis and moves the court to suppress the deposition of Wm. H. Myers, for the reasons: That no notice was given, as required by law, for the taking said deposition; and because
2 the defendant was not served with any sufficient notice of plaintiff's intention to apply for a commission to take said deposition.

Because no interrogatories were agreed upon between plaintiff and defendants, nor were any settled by the court after notice to defendant, as required by law.

Because said deposition is taken in a case not pending in this court, nor was there such case pending at the time of taking same.

Because the same has not been taken before any officer authorized by law to take depositions; nor has the same been properly certified; nor does it appear that Robert Ranney is or was an officer at all at the time the same was taken.

SPRATT, WOOD, AND OTHERS,
For Def't Davis.

Due proof of service of a copy of the notice and interrogatories for commission to take deposition of Wm. H. Myers was had in open court. The proof was by Will. F. Davis, that he made due service of the same on Robert Vivion, attorney for defendant Davis, and that he was a citizen of the United States and over the age of 21 years, and was at the time acting clerk of said court; which motion was overruled by the court, and the defendant Davis then and there duly excepted to the decision.

3 The defendant Davis also, on the 8th day of May, 1877, filed his motion to suppress the deposition of W. H. Drew, taken by plaintiff; the court overruled the motion, and the defendant Davis duly excepted, as appears by the bill of exceptions numbered 1.

Motion to suppress deposition of W. H. Drew.

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS }
vs.
DAVIS AND GILBERT. }

Be it remembered, that on the 10th day of May, A. D. 1877, that being one of the days of the May term of this court, the defendant Davis made and filed his motion to suppress the deposition of W. H. Drew, taken in said cause, which said motion is in the words and figures following, to wit:

SARAH J. FREDERICKS }
vs.
DAVIS AND GILBERT. }

The defendant Davis comes and moves the court to suppress the deposition of W. H. Drew, for the reason that the same was not taken before the person to whom the commission was directed, and that
4 the official character of the party taking the same is not properly certified.

J. G. SPRATT AND OTHERS,
Att'ys for Davis.

Which said motion to suppress deposition, coming on to be heard before the court, was overruled; to which ruling of the court the defendant A. J. Davis then and there duly excepted, and asks the court to sign this bill of exceptions, which is done this 12th day of May, A. D. 1877.

HENRY N. BLAKE, *Judge.*

The defendant also filed and made motion to suppress the deposition of George L. Kent, taken by the plaintiff, which motion was overruled by the court, and the defendant Davis then and there duly excepted.

And this cause came on to be tried on the 14th day of May, A. D. 1877, that being one of the days of the May term of this court, and on said trial the plaintiff offered in evidence a certain deed from W. H. Drew and Ann, his wife, to the plaintiff, Sarah J. Fredericks, which said deed bears date the 30th of March, A. D. 1874, and is in the words and figures following, to wit:

"Know all men by these presents that we, William H. Drew and
5 Ann Drew, his wife, of the county of Gallatin, in the Territory of Montana, in consideration of the sum of $2,000.00, two thousand dollars, to them in hand paid by Sarah J. Fredericks, of the said Gallatin County, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, remise, relea-e, and quitclaim unto the said Sarah J. Fredericks, and to her heirs and assigns forever, the following described real estate, situate in the county of Gallatin, in the Territory of Montana, to wit: One undivided one-half of a certain flouring mill, situate at the upper end of Lower Willow Creek Valley, on the northeast quarter of the southeast quarter of section seven, township one south, of range one east, together with the same half interest in and to all the

ools, implements, water right, mill dam, and all the appurtenances thereto belonging or in anywise appertaining. Also the whole of the dwelling-house, situate on the said mill-grounds, with all the tenements, hered'taments, and appurtenances thereunto belonging; and also all estate, right, title, interest, claim, and demand whatsoever in law or in equity of the said William H. Drew and Ann Drew in and to the said premises and appurtenances; to have and to hold the same unto the said Sarah J. Fredericks, her heirs and assigns, forever.

6 In witness of which we have hereunto set our hands and seals on the thirtieth day of March, A. D. 1874.

WM. H. DREW. [SEAL.]
ANN DREW. [SEAL.]

Acknowledgement.

TERRITORY OF MONTANA,
County of Gallatin, ss:

On the thirtieth day of March, A. D. 1874, personally came before me, a notary public within and for said county, W. H. Drew and Ann Drew, his wife, to me known to be the persons described in and who signed the foregoing conveyance as grantors, and acknowledged that they had executed the same freely and voluntarily for the uses and purposes therein expressed.

And the said Ann Drew was made acquainted with the contents of said conveyance, and acknowledged on examination, apart from and without the hearing of her husband, that she executed the same freely and voluntarily without fear or compulsion or undue influence of her husband, and that she does not wish to retract the same or the execution of the same.

In witness of which I have hereunto subscribed my name and affixed my seal on the thirtieth day of March, A. D. 1874.

7 [SEAL OF NOTARY.] J. J. DAVIS,
Notary Public.

Received for record March 31st, 1874, at 4 o'clock p. m., and recorded in Vol. I of deeds, at page 444.

[CO. REC. SEAL.] ARCH. GRAHAM, *Recorder.*

The defendant Davis objected to the same, on the grounds that the acknowledgement was defective; the court overruled the objection and the defendant Davis then and there duly excepted, and the deed was read in evidence. The plaintiff then offered in evidence the paper following, purporting to be the declaration of plaintiff as sole trader.

Declaration of the intention of Sarah J. Fredericks, a married woman, to transact business in her own name as sole trader.

Know all men by these presents that I, Sarah J. Fredericks, a married woman, residing with my husband at Gallatin City, in Gallatin County, Montana Territory, being desirous of availing myself of the benefits of an act of the legislature of said Territory of Montana, entitled "An act to authorize married women to transact business in their own names as sole traders," approved February, 1874, do hereby make and pub-

8 lish, and by these presents give notice unto all persons concerned or in anywise interested, that this my declaration of intention of transacting business in my own name as sole trader, is made under

the provisions of said act; and that from and after the date of the proper record of this declaration, it is bona fide, my intention to carry on and transact the business of a flour manufacturer, and miller, that it is my further intention to also carry on and transact the business of a stock raiser, owner and grazier; also a general blacksmithing business; and furthermore follow and pursue, carry on and transact in my own name and for my own use and benefit, and for the benefit of my children or any member of my family who may be dependent on me for support and maintainance, any other business, calling, avocation, profession, or pursuit in life which I may at any time find it necessary to enter upon or engage into for the proper support and maintenance of those who may be dependent upon my exertions for their means of livelihood. I furthermore make known and declare that the original amount of capital which I have invested in the aforesaid business does not exceed the sum of ten thousand (10,000) dollars, nor was the same derived from any funds belonging to my husband.

9 In testimony whereof, witness my hand and seal, this twenty-eighth day of March, A. D. 1874.

SARAH J. FREDERICKS. [SEAL.]

TERRITORY OF MONTANA,
County of Gallatin, ss:

On this 28th day of March, A. D. 1874, personally came before me, Robert W. Hill, a notary public in and for Gallatin County, and Montana Territory, Sarah J. Fredericks, to me well known to be the person who executed the foregoing instrument, and acknowledged that she executed the same freely and voluntarily, and for the uses and purposes therein set forth.

In testimony whereof, witness my hand and official seal the day and year first above written.

[SEAL OF NOTARY.] ROBT. W. HILL,
Notary Public.

Received for record March 30, 1874, at 4 o'clock p. m., and recorded in Vol. I of deeds, page 441.

[RECORDER SEAL.] ARCH. GRAHAM, *Recorder.*

To the introduction of which declaration of intention the defendant Davis objected; but the court overruled the objection and the defendant then and there duly excepted, and the same was by the court admitted in evidence.

10 The plaintiff also introduced in evidence a certain contract entered into between William H. Drew and Andrew J. Davis, relative to the erection of the mill in controversy; which is as follows, to wit:

Memorandum of agreement made and entered into this day between A. J. Davis and W. H. Drew: Said Davis agrees to furnish machinery necessary for a flouring mill to be located on Willow Creek, in the county of Gallatin, in the Territory of Montana, such as water-wheel, 1 p'ls of four-feet mill burrs, smut-mill, oat-separator, shafting, gearing, belting, bolting cloth, &c.; or, in other words, such machinery as is usually furnished by a foundry and mill-furnishing establishment for flouring-mill, all of which is to be delivered to the mill located on Willow Creek. Said Drew, on his part, agrees to furnish all material for a suitable mill building, and be at all expense of putting up the same in a suitable and workmanlike manner; further agrees to furnish material

and put up at his own expense all necessary machinery, together with the machinery which said Davis is to furnish, in a substantial
11 and workmanlike manner. Said Drew is to put in and furnish material for, at his own expense, a good and sufficient dam across Willow Creek, to be built in a permanent and substantial manner, with tubes and gates, and ap'on; said dam is to be of a sufficient height to give sufficient force and power or heads to propel all of the machinery in said mill to its full capacity. Said Drew agrees to do all other work in like manner that is or may be necessary to complete the grounds or mill, such as digging race, walling the same; digging mill-pit, and walling the same, and securing anything connected with mill or machinery, so that the entire mill and all the parts connected therewith may be substantial and permanent, and all parts connected with the machinery, and all machinery put in perfect running order, ready to start business in a permanent manner. Now it is agreed that after each party has performed his portion of the contract, as herein stipulated, that the said mill site, mill and all the land belonging to the mill tract, not to exceed 160 acres, shall be owned and held jointly, each party being entitled to one undivided half interest of mill, mill-site, or land; and that all expenses in perfecting title to the land shall be borne equally
12 and jointly. It is further agreed that after the completion of this mill, as per the terms of this contract, that said Drew, on his part, shall leave unpaid for labor or material furnished that may have been used in mill or in connection with said enterprise, that his interest shall be held liable for all such debts until the same shall be satisfied by said Drew.

A. J. DAVIS.
W. H. DREW.

BOZEMAN, *July 30th*, 1872.

Received for record, November 17th, 1873, at 8 o'clock a. m., and recorded in Vol. I of deeds, at page 387.

[SEAL OF RECORDER.] ARCH. GRAHAM,
Recorder.

The plaintiff then and there closed his testimony in chief.

The defendant DAVIS was then called as a witness, and testified as follows:

"In 1865 I bought of Johnny Grant, of Deer Lodge, his interest in a saw-mill, machinery for a grist-mill, and other property owned by Grant and Fredericks. I also at the same time bought Fredericks' interest in the saw-mill. Fredericks and myself b'ought the machinery of the grist mill to Gallatin City, in the spring or summer of 1866, and I
13 bought and shipped from the States other necessary machinery. We (Fredericks and I) built the mill at Gallatin City. I sold out afterwards to Fredericks. We afterwards sold to Ault and Purham the saw-mill, machinery, &c., and they built a saw-mill. We (Fredericks and myself) subsequently became the owners of the Ault and Parham mill, which was in my name, but for our joint benefit. I afterwards sold my half interest to W. H. Drew. Fredericks owned the other half. This was in 1871, but it stood in my name. I also, at the request of Fredericks, conveyed it, his interest, to his wife, the plaintiff.

The bill of sale was here introduced, of Davis to Mrs. Fredericks, which is as follows:

GALLATIN CITY, *July* 1, 1871.

I have this day sold unto Wm. H. Drew and Sarah J. Fredericks a certain mill near Bozeman, known as the Ault mill, for and in consideration of the sum of two thousand dollars to me paid, *and in consideration of said Ault*, do hereby transfer all of my right, title and interest in and to said property to said Drew and Fredericks, with all the privileges and appurtenances thereunto belonging, including flume &c., &c., and I do hereby warrant and defend the above premises
14 against all persons claiming through or by me up to this date.

A. J. DAVIS.

I hereby certify that the within instrument was received for record this 27th day of October, A. D. 1876, at 4 o'clock p. m., and is duly recorded in Volume K of deeds, page 142.

[SEAL GALL. CO.] AMIE J. MALIN,
Recorder.

The defe[illegible]t's counsel then asked the witness the following question: Wh[illegible] was the consideration for said conveyance of July 1, 1871 from you to Drew and plaintiff, and by whom was the consideration paid?

(The question was objected to by plaintiff, and the objection was sustained by the court, and the defendant Davis then and there excepted.)

The defendant's counsel then asked the witness the following question: Did or did not W. A. Fredericks, the husband of plaintiff, pay whatever consideration was paid?

(To which the plaintiff objected, on the ground that the evidence was incompetent, objection to the form of the question being waived. The court sustained the objection and the defendant Davis then and there excepted.)

15 The witness then testified further, that the bill of sale was delivered to Mr. Drew and Mr. Fredericks; the property included in the bill of sale was the Ault and Parham saw-mill. The half interest in said saw-mill was deeded to Mrs. Fredericks by me. Afterwards Willson, Fredericks, and I had a lawsuit about the Madison mill. The mill in question in this suit was erected under the contract between myself and Drew. The work was done by Fredericks and Drew. Fredericks was the millwright, and employed all the hands but three, and those Fredericks told me he had agreed to pay. Fredericks and Drew made an arrangement by which they come to carry out the provisions of the contract between Drew and myself.

The defendant's counsel then asked the following question: Did you have any conversation with W. A. Fredericks and W. H. Drew, or either of them, in regard to what was the agreement and arrangement in regard to the erection of the mill subsequent to July, 1872?

(To which question the plaintiff objected; the objection was sustained by the court, and the defendant then and there excepted.)

The following question was then asked the witness by defendant Davis' counsel: Relate any conversation, if there was any, be-
16 tween yourself and W. H. Drew subsequent to July, 1872, in relation to the erection of the mill in controversy?

(The question was objected to, and the objection was sustained by the court, and the defendant excepted.)

The defendant, the witness Davis being upon the stand, offered to show by the witness that W. A. Fredericks, plaintiff's husband, was working on the mill in its erection, for the purpose of enjoying Drew's

interest, or a part thereof, in the property under the Davis contract, asked the witness the following question:

State, if you know, under what, if any, agreement or arrangement between W. A. Fredericks and W. H. Drew, Fredericks was at work in erecting the grist mill on Willow Creek.

The witness answered that he did know.

The question was then asked: What was the agreement or arrangement between them?

Answer. W. A. Fredericks was to have a one-fourth interest and W. H. Drew a one-fourth interest under the contract. That no one furnished any means or work save himself, Drew, and W. A. Fredericks; that the plaintiff did not furnish a dollar to defendant's knowledge; that he had frequently talked with plaintiff about the building of the mill, and with W. A. Fredericks and Drew in her presence. Wit-
17 ness further testified: After the mill was commenced in 1872, Mr. Fredericks continued to work on it until the winter of 1872, when he came to my house in Helena with his family. Drew came there during the winter. Drew said he relied upon Fredericks to do the work. Mrs. Fredericks said she requested that Fredericks undertook to do the work in erecting the mill; that Fredericks owned one-quarter, Drew one-quarter, and I the other half. She further said that Drew had no money and nothing but lumber, and that she believed that Drew would not get through with it, because they had no means. In the summer of 1873 another conversation occurred between Drew, Fredericks, Mrs. Fredericks, and myself. Mr. Drew said he was willing to furnish lumber; that he had done so, and would continue to do so, and would furnish three men and pay them in lumber; that Fredericks had no money to pay the hands. In the spring of 1874, or latter part of winter, Drew, plaintiff, Fredericks, and myself, had a conversation in Helena. Mr. Fredericks stated that he was about to trade his interest in the saw-mill for Drew's interest in the flour mill. They finally concluded to trade. The conveyances, as they stated, was made from Drew to plaintiff and from plaintiff to Drew. The plaintiff inquired of me
18 if this would be safe against Thomas' judgment. I answered that probably Thomas would not interfere, but that if it was intimated and he found out the facts, he would probably trouble them. She then stated that Thomas was watching them, and that if they had $1,000.00 they could probably buy Thomas' judgment of about $12,000 against Fredericks for that sum. Soon after this conversation she made another trip to Helena, previous to the commencement of this suit, and stated to me that she had fixed the matter by giving a mortgage to her father, and that Thomas could not get at the property; this, I think, was in the fall of 1874. I suppose I have conversed with her, and in her presence with Drew and Fredericks, within bounds, one hundred times.

The following question was then asked the witness: "Why was the conveyance from you to plaintiff and Drew made to her?

(The plaintiff objected to the question on the ground of incompetency. The court sustained the objection, and defendant Davis then and there excepted.)

The defendant then asked the witness the following question: "State whether, at the time of the conveyance, you offered to convey the property to Fredericks, and whether he refused, and directed you
19 to convey the same to his wife.

(The plaintiff objected to the question on the ground that the

evidence was incompetent. The court sustained the objection, and the defendant then and there duly excepted.)

The witness then testified: "I boarded with Fredericks a portion of the time from 1868 to 1871, on an average of 2 or 3 days per month; sometimes longer, sometimes but a day. Plaintiff came to this country with me, and I advanced money to Fredericks to bring her here. From my knowledge of her pecuniary condition, she had no money; she so stated to me. I never saw any evidence that she had means. I furnished nearly everything for the table; some clothing I furnished her. I bought her parlor stove and carpet. I made her a present of a horse, saddle, and bridle for washing she did for me. She came here with me in spring of 1868, and I have known her ever since. Fredericks in 1868 was insolvent, and has been ever since, and now is.

On cross-examination, witness said: "I executed the conveyance to plaintiff and Drew. I believe it bears the right date. They exchanged, as they told me. I stated to her that the conveyance might be
20 good, if not intimated. The plaintiff and her husband were living at Gallatin City at the time of the conveyance to plaintiff and Drew. Part of the machinery of the Ault mill was removed to Middle Creek. Fredericks was working for me for the purpose of obtaining money to build the mill. Mr. Word offered to sell me the Thomas judgment in 1870 or 1871. Word offered the judgment to me for one thousand dollars. No one was present but Word and myself; this was in Bozeman or Gallatin City.

On re-examination the witness was asked concerning the removal of the machinery of the Ault mill to Middle Creek.

(The plaintiff objected to the question, and the court sustained the objection, and did then and there instruct the jury to disregard all testimony in regard to the removal of said property. To the sustaining of the objection and the instruction of the court the defendant Davis then and there duly excepted.)

I deeded the Ault mill to plaintiff and William H. Drew; the title was in my name; part of the machinery of the Ault mill was
21 removed to Middle Creek and placed in what is known as the Drew saw-mill; that plaintiff traded her interest in the said Drew saw-mill for Drew's interest in the Willow Creek flouring mill; the parties told me so; that W. A. Fredericks was to have a one-fourth interest from Drew for his labor on the mill.

WM. H. MARIAN testified: "I am a carpenter; worked on the flouring mill for over two months while it was being erected; Fredericks employed and paid me.

On cross-examination, witness stated: "I do not know where the funds came from I was paid out of; Drew offered to secure me for my wages on his property; no mortgage was given.

WM. H. WRIGHT testified: I hauled about 10,000 or 12,000 feet of lumber from Drew's saw mill to the flouring mill, in the fall of 1872 or the spring of 1873; Fredericks employed me; got my pay in lumber from Drew's saw mill, about $200.00; Mr. Cullon also hauled on my contract 5,000 additional feet; he was paid in the same way.

The defendant then asked the witness the following question:
22 "During the time of the erection of the mill did you have any conversation with Mr. Fredericks in regard to his interest in the mill?"

(The question was objected to, and the objection was sustained by the court, and the defendant Davis then and there duly excepted.)

Mrs. Fredericks told me in the spring of 1873 that she owned the mill.

Cross-examined:

I understood from her that she owned an undivided one-half interest in both the grist mill and the saw mill; know from what Fredericks told me that Davis sold the mill to Mrs. Fredericks; when I spoke to Fredericks concerning hauling the lumber he said he would go and see Drew; he then came back and told me that I could haul the lumber; I hauled the lumber and Drew paid me in lumber for the hauling.

Re-examined:

I lived near Mrs. Fredericks' since she came to the country in 1868; to all appearances her means were limited; her means, up to the time I hauled the lumber, were limited; the saw mill was always at work while I was there; don't know that they made any money.

23 WILLIAM RYAN testified:

I own the premises on which the mill is situated; was the owner when the same was erected. I worked a short time on the mill in the summer of 1872, on dam, under Frederick's direction. My brother, Bates Ryan, worked on dam and in the mill in 1872. Fredericks employed him. He worked 7 or 8 months at $50.00 per month. Mr. Fredericks paid part in money and part in flour from the mill. He once turned over a load of flour, and it was hauled to Helena, and from the proceeds of this flour plaintiff paid me for my brother. This was in the spring of 1874. Fredericks first employed my brother in the spring of 1873.

On cross-examination the witness said: "I believe plaintiff gave a note to my brother, W. M. Wright signed as security; don't know who the flour I got belonged to. The note that was executed by plaintiff, with W. M. Wright as security, to my brother was for his wages while working on said mill.

Mariam was recalled and stated: "Mr. Fredericks worked on the mill all the time I was there, and was working there when I went there to work."

24 Mrs. ALICE STREET: I am acquainted with Sarah J. Fredericks. In spring of 1875 I had conversation with her at my house in Gallatin City. Mrs. Fredericks said she owned the property, and how she got possession of it I do not know. Mrs. Fredericks said she was very much surprised, on her arrival in this Territory, to find her husband bankrupt. She spoke about Davis being kind to her. I never saw Mrs. Fredericks but a few times previous to this suit. Mrs. Fredericks staid at my house 10 days, while my husband and Fredericks were gone to Helena. She made my house her stopping place while at Gallatin City. She said something about a judgment held or owned by Thomas, and that her husband could not hold any property.

Cross-examined:

Mr. Davis called to see me yesterday and told me he would want me for a witness to-day, and not to go away or he would have her summoned. He then asked me two or three questions in regard to this matter. I heard Mrs. Fredericks say she was associated with Mr. Drew in the saw-mill. It was at Mrs. Fredericks' house that I heard her say her husband had lost all his property in this Territory.

25 Defendant Davis then offered and read in evidence the complaint, summons, affidavit, and attachment, and sheriff's return

thereon in the case of Andrew J. Davis vs. W. A. Fredericks, which are as follows, to wit:

Complaint.

TERRITORY OF MONTANA,
County of Gallatin:

In the district court first judicial district M. T.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The plaintiff complains of the above-named defendant and alleges: That heretofore, to wit, on the 14th day of November, A. D. 1873, at the county of Gallatin, in the Territory of Montana, the said plaintiff was the owner and in the possession of an undivided one-half of a certain flouring mill situated on Willow Creek, in said county and Territory; that on the day and date last aforesaid the said plaintiff, by contract in writing, leased the said undivided half of said mill and premises to the said defendant for the period of one year from said date, which said written contract was duly signed by said defendant; that by the terms of said contract the said defendant, in consideration of said
26 lease, undertook, promised, and agreed to pay and deliver to said plaintiff the one-fourth of the gross earnings of the said mill and premises, including wheat, bran, and screenings; that the said defendant, under said contract, took possession of said half of said mill and premises, and has used and occupied the same from the said 14th day of November, A. D. 1873, until the present time; that the gross earnings of said mill and premises during the time aforesaid are and have been in grain, flour, bran, shorts, and screenings of the value of ten thousand dollars; that one-fourth of the said gross earnings of said mill are and have been of the value of two thousand five hundred dollars; that the said one-fourth of the gross earnings of said mill are now due to plaintiff; that heretofore, to wit, on the 5th day of March, 1875, at the said county of Gallatin, the said plaintiff demanded from the said defendant the payment and delivery to him of the said one-fourth of the gross earnings of said mill as aforesaid, but to pay or deliver the same, or any part thereof, the said defendant has wholly failed, and still and refuses to pay or deliver the same or any part thereof, and that the whole of said ¼ of said gross earnings is now due and remains
27 unpaid; wherefore the plaintiff prays judgment against the said defendant for said sum of twenty-five hundred dollars and costs of suit.

THOMAS R. EDWARDS,
Att'y for Plaintiff.

TERRITORY OF MONTANA,
County of Gallatin, ss:

A. J. Davis, the above named plaintiff, makes oath and says that he has heard read the foregoing complaint, and that the facts as therein stated are true of his own knowledge.

A. J. DAVIS.

Subscribed and sworn to before me this 6th day of March, A. D. 1875.
W. F. DAVIS, *Clerk.*

Filed March 6th, 1875. W. F. Davis, clerk.

In the district court of the first judicial district of the Territory of Montana in & for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

Action brought in said district court of the first judicial district of the Territory of Montana, in & for the said county of Gallatin, and the complaint filed in the said county of Gallatin in the office of the clerk of said district court.

The people of the Territory of Montana send greeting, to W. A. Fredericks, defendant:

You are hereby required to appear in an action brought against
28 you by the above-named plaintiff, in the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district within twenty days; otherwise, within forty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to recover the sum of twenty-five hundred dollars for money due for rent on premises. And you are hereby notified, that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment by default against you for the relief demanded in his said complaint.

Given under my hand and the seal of the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, this sixth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Attest, my hand & the seal of said court.

SEAL OF THE DIST. COURT FIRST JUDICIAL DIST. GALLATIN COUNTY, MONTANA TERRITORY.

C. L. DAVIS, *Clerk.*

29 *Sheriff's return.*

Office of the sheriff of the county of Gallatin, M. T.

I hereby certify, that I received the within summons on the 4th day of March, A. D. 1875, and personally served the same on the 8th day of March, A. D. 1875, upon the defendant named in said summons, by delivering to W. A. Fredericks, said defendant, personally, in this said county of Gallatin, a copy of said summons in said action, named in said summons, attached to said copy of summons.

Dated this ninth day of March, A. D. 1875.

C. L. CLARK, *Sheriff.*

Filed on return, March 9th, 1875.

W. F. DAVIS, *Clerk.*

Affidavit.

District court of the first judicial district of the county of Gallatin and Territory of Montana.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

A. J. Davis, the above-named plaintiff, makes oath and says that defendant is justly indebted to plaintiff in the sum of twenty-five hundred dollars upon express contract for the payment of money now due, and which is not secured by a mortgage lien or pledge upon real
30 or personal property. Said indebtedness is based upon a written promise to pay rent for the use and occupation of a certain mill property upon Willow Creek, in said county & Territory.

A. J. DAVIS.

Subscribed and sworn to before me this 6th day of March, A. D. 1875.
W. F. DAVIS, *Clerk.*

Filed March 6th, A. D. 1875. W. F. Davis, clerk.

Writ of attachment.

In the district court of the first judicial district of the Territory of Montana, in & for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above-entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin aforesaid, by the plaintiff in said action, to recover from the defendant, W. A. Fredericks, in the said action, the sum of $2,500.00 *dollars* lawful money of the United States, besides interest at the rate of per cent. per from the day of ,
A. D. 187 , and costs of suit; and the necessary affidavit
31 and undertaking herein having be' filed, as required by law: Now we do, therefore, command you, the said sheriff, that you attach and safely keep all property of said defendant, W. A. Fredericks, within your said county not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant give you security, by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in any amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking and hereof make due and legal service and return.

Witness Hon. F. G. Servis, judge of the said district court of the first judicial district, this 6th day of March, A. D. 1875.

Attest my hand and the seal of said court the day and year last above written.

[L. S.] W. F. DAVIS, *Clerk.*

Filed on return March 9th, A. D. 1875. W. F. Davis, clerk.

List of property attached by virtue of the writ of attachment hereunto appended, to wit: One blacksmith forge; one bellows; one anvil;
32 one vice; two screw-plates; hammers; tongs; cold chisels; one hand saw; blacksmith chest; one diamond plow; thirty bushels of charcoal, more or less; one lot of horseshoes (new), and lot of iron and one dirt scraper.

Witness my hand this 20th day of March, A. D. 1875.

C. L. CLARK,
Sheriff of Gallatin County, M. T.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, hereby certify and return that, by virtue of the writ of attachment hereunto appended, I did, on the 8th day of March, A. D. 1875, levy upon as the property of the said defendant, W. A. Fredericks, the following described property, to wit:

The one equal and undivided half of the Willow Creek grist or flouring mill, situate on Willow Creek, on section numbered seven (7), township numbered one (1) south of range numbered one (1) east of the lands granted to the North Pacific Railroad Company by the United States, together with the equal one-half of all and singular the tenements, hereditaments, and appurtenances, as well as one-half of all the mill dams, races, flumes, fixtures, and machinery thereunto belonging or in any wise appertaining; also 498 sacks of flour, a quantity of
33 wheat, bran, shorts, and all the tools and other property in the building claimed or owned by the said defendant; also a pile of lumber, 500 feet, more or less, lying close to the mill; also the frame dwelling house situate and lying in Gallatin City, Gallatin County, together with the land upon which said house is situated, and the log house occupied by J. H. D. Street, and all other improvements upon said land claimed and owned by said defendant, W. A. Fredericks.

Witness my hand this the 9th day of March, A. D. 1875.

C. L. CLARK,
Sheriff.

The defendant Davis, being further examined, stated:

The premises described in the complaint in this cause are the same as described in the sheriff's return.

The defendant then introduced A. J. Malin, who testified: "I am clerk and recorder of Gallatin County. A copy of the attachment and return of the sheriff of the levy on said property was filed by the sheriff in the recorder's office on the 20th day of March, A. D. 1875.

The defendant Davis also offered in evidence certain letters written to him by W. A. Fredericks and Wm. H. Drew, as follows, to wit: Letters of W. A. Fredericks to Davis, dated, respectively, Sept. 28th, Oct. 16, Oct. 22, Oct. 28, May 8, Sept. 2d, Dec. 11, & Dec. 12, 1872; July
34 8, Oct. 26, 1873, and Feb'y 7 & April 8, 1874. Letters of Drew to Davis, dated respectively, Aug. 20th, May 1, May 30, and March 28th, 1874.

The same being offered as stated by Davis' attorneys to establish the fact that said Sarah J. Fredericks was not the owner of the premises claimed by her in her complaint, but that W. A. Fredericks was the owner thereof. The plaintiff objected to the introduction of said letters. The court sustained the objection, and the defendant Davis then and there duly excepted. Said letters were afterwards introduced and read in evidence by said Davis.

The defendant Davis, while being on the stand, was questioned by

defendant Davis' attorneys relative to declarations made by W. A. Fredericks and Wm. H. Drew, while the mill was in course of erection and before the conveyance of Drew's interest to plaintiffs, as to Fredericks being the owner of the mill, but the court refused to allow the witness to testify on that subject, and the defendant Davis then and there duly excepted.

The defendant Davis then rested, and the plaintiff then again placed defendant Davis on the stand and asked him the following questions.

"In June, 1875, did you say to W. H. Drew that you would
35 break plaintiff and W. A. Fredericks up in business if it cost you $10,000.00?

The question was objected to by defendant Davis' counsel; the court overruled the objection, and the defendant Davis then and there duly excepted.

Answer. I did not make any such remark.

The plaintiff then read in evidence the deposition of Wm. H. Drew *in evidence*, subject to the objections of Davis to certain questions and answers marked on said deposition.

In the district court of the first judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS, CALEB GILBERT AND Wellington A. Fredericks, defendants.

To the above named defendants or their attorneys, Chumasero & Chadwick & Messrs. Edwards and Vivion and Word.

You will please take notice that on the 2nd day of December, A. D. 1876, the plaintiff above named will apply to the clerk of the court aforesaid at his office in Bozeman, Gallatin County, Montana Territory, for a commission to take the deposition of William H. Drew, in the county of Mohave, in the Territory of Arizonia, before some officer author-
36 ized by the laws of this Territory to take said deposition. That said application will be made between the hours of 10 a. m. and 12 o'clock m. of said day, and upon this notice and interrogatories hereunto annexed, and when so taken to be used in evidence on the trial of the above case.

JOHNSTON & TOOLE,
J. H. SHOBER & SANDERS & CULLEN,
Attorneys for Plaintiff.

Received a copy of the above notice with copy of annexed interrogatories this 24th day of November A. D. 1876.

SAMUEL WORD & J. G. SPRATT,
Attorneys for Def't Davis.

In the district court 1st judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS, CALEB GILBERT AND Wellington A. Fredericks, defendants.

Interrogatories propounded by plaintiff to William H. Drew in pursuance of the annexed notice.

Interrogatory 1st. What is your name, age, place of residence and occupation?

37 Interrogatory 2nd. Have you ever resided in Gallatin County, Montana Territory; if you say yea, when and how long?

Interrogatory 3rd. Are you acquainted with the plaintiff, Sarah J. Fredericks, and with said defendant; if so, when, and how long, and where?

Interrogatory 4. State if you were interested in the purchase of said Davis of a saw mill situate in Gallatin County, Montana Territory. If so, who else was interested; what was the extent of such interests purchased; when was such interests purchased; what was the consideration paid for it and by whom paid? Here answer what interest said plaintiff got, and what she paid for such interest, if you know. State all you know about the consideration paid by said plaintiff to said defendant for the interest in said mill, and all the said Davis said about the said sale and transfer to plaintiff in your hearing, and in whose presence said sale was made.

Interrogatory 5th. Who moved and rebuilt said saw mill after the said purchase, and under what contract or agreement, if any?

Interrogatory 6. What disposition did the plaintiff make of her interest in said saw mill?

38 Interrogatory 7. State, if you know, whether Wellington A. Fredericks owned any interest in said saw mill or the grist or flouring mill on Willow Creek, in said Gallatin County, Montana Territory, and what were your opportunities of knowing the fact; also state fully what you know in this connection.

Interrogatory 8. State fully how the plaintiff was to pay her part of the expenses of moving and rebuilding and for other necessaries to complete said saw mill; who hired and paid the hands or workmen to labor in and about said saw mill; who employed Wellington A. Fredericks (if any one) and upon what terms was he employed. State fully all the facts within your knowledge in this connection.

Interrogatory 9. Who controlled and operated said saw mill after its completion; who received the profits of the same, and under what lease (if any) or agreement (if any) was said mill operated?

Interrogatory 10. Had Wellington A. Fredericks any interest in said saw mill or in the profits thereof?

39 Interrogatory 11. State who built said flouring mill on Willow Creek, in said Gallatin County, and under what contract or agreement (if any) said mill was built; what was the extent of such interest. State all you know in connection with said contract. State fully what interest you had (if any) in said flouring mill on Willow Creek, in said Gallatin County, and how you disposed of your interest therein; and if so, to whom and for what consideration did you dispose of the same?

Interrogatory 12. State anything else you may know and anything you have heard Davis say that will be of advantage to plaintiff.

In the first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS, CALEB GILBERT, AND Wellington A. Fredericks, defendants.

To J. Logan, or any acting justice of the peace in and for the county of Mohave, Territory of Arizona:

Know you that we, in confidence of your prudence and fidelity,
40 do by these presents authorize you to cause to come before you

to be examined as witness, in a cause now pending in our district court of the Territory of Montana, in and for the county of Gallatin, wherein Sarah J. Fredericks is the plaintiff, and Andrew J. Davis, Caleb Gilbert, and Wellington A. Fredericks are the defendants, all and every such person and at such time and place appointed by you for that purpose, and especially William H. Drew. And we command you to examine all and every such person upon his oath or affirmation, first made or taken before you, to testify to the whole truth touching his knowledge or anything relating to the said matter in controversy between the said parties, and all interrogatories to the said witness and their answers thereto reduced to writing by you. When you have so taken the examinations, you are to cause the witness to sign the same, and to that end, each examination at the foot thereof, you are to append your certificate, setting forth the fact that the examination was reduced to writing, subscribed and sworn to or affirmed in your presence, and the day as well as between what hours of the day on which it was taken, as well the place of residence of the witness if known
41 to you. Should any paper be produced or proven or referred to by the witness, you are to describe the same in his examination, or cause the same to be so marked by him as to establish its identity and to attach the same to his examination. The examination thus taken you will accompany by a certificate of your official character under your seal of office, if there be one. You will also obtain the certificate and seal of the clerk of some court of record or any county of the State, district, or Territory in which you reside, as to your official character, stating also, in addition to the facts of his being a clerk and that the court is one of record, that at the time when the deposition was taken you were an acting judge or other such official to whom the commission is addressed, and duly commissioned as such, and you will return the same and all exhibits produced to you annexed hereto, carefully closed up and under your seal, directed to the clerk of the district court in and for the county of Gallatin, Montana Territory, with the names of the parties litigant indorsed thereon, with all convenient speed.

42 Given under my hand and the seal of said district court at Bozeman, this 2nd day of December, A. D. 1876.

[L. S.] THEO. MUFFLY, *Clerk.*
By AMIE J. MALIN,
Deputy Clerk.

TERRITORY OF MONTANA,
County of Gallatin:

In the 1st judicial district court, Gallatin Co., M. T.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS & CALEB GILBERT, DEFENDANTS.

Cross-interrogatories to be propounded to witness William H. Drew on the part of the defendant Andrew J. Davis.

Interrogatory No. 1. You will please state your name, age, and place of residence.

Interrogatory No. 2. Where did you reside in the years A. D. 1868, 1869, 1870, 1871, 1872, and 1873?

Interrogatory No. 3. If your answer to interrogatory No. 2 be that in the year 1870, 1871, 1872, or any part thereof, you resided in Gallatin County, Montana Territory, state whether, during that time or prior thereto, you were acquainted with the defendant Andrew J. Davis, Wellington A. Fredericks and his wife (the plaintiff in the above-entitled suit), Sarah J. Fredericks.

43 Interrogatory 4. Where did the plaintiff, Sarah J. Fredericks, Wellington A. Fredericks, and the defendant Andrew J. Davis reside during the years mentioned in interrogatory 2, and in what business were they engaged?

Interrogatory No. 5. State what knowledge you have in relation to a certain saw mill in Gallatin County, M. T., owned in 1871 and prior to that time by defendant Davis, and where the same was situated, and of what value was it.

Interrogatory 6. State if you at any time purchased any interest in said saw mill, and, if so, what interest, and from whom did you purchase the same, and what was the value thereof?

Interrogatory No. 7. If your answer to the last interrogatory be that you purchased one-half interest in said mill, state who owned the other half, and to whom was it conveyed, if at all.

Interrogatory 8. If you state that you purchased one undivided half of said mill from the defendant Davis, and that he conveyed the same to you, and if you state in answer to interrogatory No. 7 that the other half of said mill was conveyed to the plaintiff, Sarah J. Fredericks, you will please state, if you know, the same was conveyed by Davis to said plaintiff in this suit.

44 Interrogatory 9. You will state if you were present when said half of said mill was conveyed by defendant Davis to the plaintiff, Mrs. Sarah J. Fredericks, and who else was present beside yourself.

Interrogatory 10. State in full and with particularity any and all conversation that occurred in your presence between the defendant Davis and W. A. Fredericks, and the plaintiff, Mrs. Sarah J. Fredericks, in reference to the conveyance of said half of said mill to Mrs. Sarah J. Fredericks, and in reference to the ownership of the same at the time such conveyance was made and immediately prior thereto. Witness will state as fully as his recollection serves him what each party said in that conversation in reference to said half of said mill and the disposition thereof.

Interrogatory 11. State if the plaintiff is the wife of W. A. Fredericks, and if at any time after the conveyance of said saw-mill property you had any conversation with the plaintiff and said W. A. Fredericks, or with the said W. A. Fredericks in the presence and hearing of the said plaintiff, in reference to the ownership of said half of said saw mill, you will please state when and where each conversation occurred, as

45 well as you recollect, and what was said in each conversation, and by whom said.

Interrogatory 12. State who controlled, possessed, and worked and used said saw mill while you owned any interest in the same, and for whose benefit the same was used.

Interrogatory 12. If in your answer to the preceding interrogatory you state that you purchased one undivided half of said saw mill from defendant A. J. Davis, you will state if at any time thereafter you acquired any other or greater interest in said mill; and, if so, what other interest, and from whom you acquired it when acquired, and what was

the consideration you gave for the same, and with whom did you make trade for the same.

Interrogatory 13. If in your answer to the next preceding interrogatory you state that you did afterwards acquire the other half interest in said saw mill, you will state to whom you conveyed the said half interest in the grist mill, and at whose request you so conveyed it, and for what purpose it was so conveyed.

Interrogatory 14. State where the grist mill is located of which you conveyed one half to the plaintiff, and by what name was or is it
46 known, and who owned the other half of the same.

Interrogatory 15. If in your answer to interrogatory No. 13 you state you conveyed the half interest in the grist-mill deed appurtenances to Mrs. Sarah J. Fredericks, the plaintiff in this action, you will state what statements were made, if any, to you or in your hearing, by the plaintiff, Mrs. Sarah J. Fredericks and W. A. Fredericks, or either of them, at the time of such conveyance or afterwards, as to the ownership thereof, and what reasons, if any, were assigned by them or by either of them for having the same conveyed to plaintiff. Please state the time and place of any such statements or conversation, as near as may be, and state all that was said by all parties in such conversation as fully as remembered.

Lastly. Do you know of anything concering the matters in question that may tend to the benefit and advantage of the said defendant, Andrew J. Davis, you will declare the same fully and at large as if you had been particularly interrogated concerning the same.

attorneys for defendant A. J. Davis.

(Signed) SAMUEL WORD, THOMAS EDWARDS,
CHUMASERO AND CHADWICK,
Attorney for Defendant A. J. Davis.

47 In the district court, first judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
WELLINGTON A. FREDERICKS, ANDREW J. DAVIS, and CALEB GILBERT, defendants.

Be it remembered that, pursuant to the notice hereunto annexed, and on this 10th day of February, A. D. 1877, at 2 o'clock p. m., at my office, in the county of Mohave, Arizona Territory, before me, R. R. Banker, a justice of the peace in and for Mineral Park precinct, in said county, personally appeared William H. Drew, a witness provided on behalf of the plaintiff in the above-entitled action, now pending in said county, who, being by me first duly sworn, was then and there examined and interrogated by the said R. R. Banker, justice of the peace, and testified as follows, to wit:

Interrogatories propounded by plaintiff William H. Drew, in pursuance of the annexed notice.

Interrogation 1st. What is your name, age, place of residence, and occupation?

48 Answer. William H. Drew; 54 years; residence, Greenwood, Mohave County, Arizonia Territory; a farmer.

Int. 2. Have you ever resided in Gallatin County, Montana Territory; if so, when, and how long?

Answer. Yes; from the year A. D. 1864 until A. D. 1875.

Int. 3. Are you acquainted with the plaintiff, Sarah J. Fredericks, and with said defendants; if so, when, and how long?

Answer. I am acquainted with all the parties except Mr. Gilbert.

Int. 4. State if you were interested in the purchase of said Davis of a saw mill, situated in Gallatin County, Montana Territory; if so, who else was interested; what was the extent of such interest purchased; when was such interest purchased; what was the consideration paid for it, and by whom paid. Here answer what interest said plaintiff got, and what she paid for such interest, if you know; state all you know about the consideration paid by said plaintiff to said defendant for the interest in said mill, and all that said Davis said about the said sale and transfer to said plaintiff in your hearing, and in whose presence said sale was made.

49 Answer. I was interested; I purchased a one-half interest in the said saw mill. Sarah J. Fredericks purchased the other one-half interest. My interest was purchased on the 2nd day of July, A. D. 1871, for one thousand dollars; gave my note for the amount. Plaintiff told me she had paid Davis one thousand dollars for her one-half interest. I saw a bill of sale from Davis to the plaintiff, which guaranteed to defend the title of said mill against any and all persons.

(Objected to by defendant.)

Davis told me he had sold to plaintiff one-half interest in said mill; the sale was made in the presence of W. A. Fredericks and myself.

Interrogation 5. Who moved and rebuilt said saw mill after the said purchase, and under what contract or agreement, if any?

Answer. I hired W. A. Fredericks to move and rebuild the said saw mill, W. A. Fredericks having the right to hire what help was necessary. I paid all the expense of removing said mill, and I was to have all the proceeds of the said mill until I was repaid for the said expenses of moving and rebuilding.

Interrogation 6. What disposition did the plaintiff make of her interest in the said saw mill?

50 Answer. She sold her interest to myself, William H. Drew.

Interrogation 7. State, if you know, whether Wellington A. Fredericks owned any interest in said saw mill, or the grist or flouring mill on Willow Creek, in said Gallatin County, Montana Territory, and what were your opportunities of knowing the facts; also state fully what you know in this connection.

Answer. W. A. Fredericks had no interest in either the said saw mill or the grist or flouring mill. Sarah J. Fredericks and myself owned the saw mill, and the grist or flouring mill was owned by myself and A. J. Davis, as bill of sale of said saw mill and contract of the said grist mill will show.

Interrogation 8. State fully how the plaintiff was to pay for her part of the expenses of moving and rebuilding, and for other necessaries to complete said saw mill; who hired and paid the hands or workmen to labor on or about said saw mill; who employed Wellington A. Fredericks, if any one, and upon what terms was he employed; state fully all the facts within your knowledge in this connection.

Answer. By the use of said mill when completed. I paid the workmen; I employed W. A. Fredericks at five dollars per day. I paid

51 all expenses of moving and rebuilding said mill.

Interrogation 9. Who controlled and operated said saw-mill after its completion? Who received the profits of the same and under what lease (if any) or agreement (if any) was said mill operated?

Answer. I controlled and operated the said mill. I received the profits under an agreement with plaintiff to receive the same until I was paid for expenses of moving and rebuilding and repairs necessary on said mill.

Interrogative No. 10. Had William A. Federicks any interest in the said saw-mill or in the profits thereof?

Answer. He had no interest or profits in said saw-mill.

Interrogative 11. State who built said flouring mill on Willow Creek, in said Gallatin County, and under what contract or agreement (if any) said mill was built; what was the extent of such interest. State all you know in connection with said contract; state fully what interest you had (if any) in said flouring mill on Willow Creek, in said Gallatin County, and how you disposed of your interest therein. And, if so, to whom and for what consideration did you dispose of the same?

Answer. Myself and Andrew J. Davis built the said mill under
52 contract as recorded in Bozeman, Gallatin County, Montana Territory, in the county clerk's office. Each had a one-half interest. I had one-half interest in the said flouring mill on Willow Creek, in Gallatin County. I sold my interest to Sarah J. Fredericks for two thousand dollars lawful money of the United States of America.

(Objection.)

Interrogati'n 12. State anything else you may know and anything that you have heard Davis say that will be of advantage to the plaintiff.

Answer. In June of A. D. 1875, I heard Davis say he would break them up in business, Sarah J. Fredericks and W. A. Fredericks, if it cost him ten thousand dollars to do so.

(The defendant objected to the above question and the response thereto by the witness, which objection was sustained by the court.)

Cross-interrogatories propounded to William H. Drew on the part of the defendant Andrew J. Davis.

Interrogatory 1. You will please state your age, name, and place of residence.

Answer. William H. Drew; age, 54 years; reside in Greenwood, Mohave County, Arizona Territory; am a farmer.

53 Interrogatory 2. Where did you reside in the years A. D. 1868, 1869, 1870, 1871, 1872, and 1873?

Answer. In Montana Territory, Gallatin County.

Interrogatory No. 3. Was you acquainted during any of these years with Andrew J. Davis, Wellington A. Fredericks, and Sarah J. Fredericks (his wife), plaintiff in this action.

Answer. I was acquainted with them.

Interrogatory No. 4. Where did the plaintiff, Sarah J. Fredericks, Wellington A. Fredericks, and the defendant Andrew J. Davis reside during the years from 1868 to 1873 inclusive, and in what business were they engaged?

Answer. During that time Sarah J. Fredericks and Wellington A. Fredericks resided in Gallatin County, Montana Territory, except a portion of one year. I think 1872 they were at Helena, Montana Territory, working for A. J. Davis. Andrew J. Davis resided during that time at Helena.

Interrogatory 5. State what knowledge you have in relation to a certain saw-mill in Gallatin County, Montana Territory, owned in 1871 and prior to that time by defendant Davis, and where the same was situated and of what value it was.

54 Answer. Said mill was situated about 3½ miles east of Bozeman, in Gallatin County, Montana Territory, and valued at two thousand dollars.

Interrogatory 6. State if you at any time purchased any interest in said saw-mill. And, if so, what interest, and from whom did you purchase the same, and what was the consideration?

Answer. I purchased of A. J. Davis (½) one-half interest for one thousand dollars.

Interrogatory 7. Who owned the other one-half interest and to whom was it conveyed, if at all?

Answer. Andrew J. Davis, and he conveyed it to Sarah J. Fredericks?

Interrogatory 8. If you state that you purchased an undivided one-half of said mill from the defendant Davis, and that he conveyed the same to you; and if you state in answer to interrogatory No. 7 that the other half of said mill was conveyed to the plaintiff, Mrs. Sarah J. Fredericks, you will state if you know the same was conveyed by Davis to the said plaintiff in this suit?

Answer. I saw the conveyance.

Interrogatory No. 9. You will state if you were present when said one half of said mill was conveyed by defendant A. J. Davis to the plaintiff, Sarah J. Fredericks, and who else was present besides yourself.

55 Answer. I was present, also W. A. Fredericks.

Interrogatory 10. State in full and with particularity any and all conversation that occur'ed in your presence between the defendant Davis and W. A. Fredericks in reference to the conveyance of said one-half of said saw-mill to Mrs. Fredericks, and in reference to the ownership of the same at the time said conveyance was made, and immediately prior thereto. Witness will state, as fully as his recollection serves him, what each party said in that connection in reference to said half interest in said mill and the disposition thereof.

Answer. I have no recollection of any conversation.

Interrogatory 11. State if the plaintiff is the wife of W. A. Fredericks, and if at any time after the conveyance of said saw-mill property you had any conversation or conversations with the plaintiff and said W. A. Fredericks, or with the said W. A. Fredericks in the presence and hearing of the said defendant, in reference to the ownership of said half of said saw-mill, you will please state when and where each conversation occurred as well as your recollection may enable you to do, and what was said in each conversation and by whom said.

Answer. She is. I do not now recollect any conversation with
56 either Mr. W. A. Fredericks or with his wife, Sarah J. Fredericks, in regard to the ownership of said saw-mill.

Interrogatory 12. State who constructed, possessed, and worked and used the said saw-mill while you owned any interest in the same and for whose benefit the same was used.

Answer. I possessed, worked, and received the benefits of it.

Interrogatory 13. If your answer to the preceding interrogatory you state that you purchased an undivided one-half of said saw-mill from defendant Davis, you will state if at any time thereafter you acquired any other or greater interest in said saw-mill; and, if so, what other interest and from whom you acquired it, when acquired, and what was the consideration you gave for the same, and with whom did you make trade for the same?

Answer. I acquired a greater interest. I bargained with Sarah J. Fredericks for her one-half interest in said saw-mill in December of A. D. 1873, shortly after we traded back.

Answer. I controlled and operated the said mill. I received the profits under an agreement with plaintiff to receive the same until I was paid for expenses of moving and rebuilding and repairs necessary on said mill.

Interrogative No. 10. Had William A. Federicks any interest in the said saw-mill or in the profits thereof?

Answer. He had no interest or profits in said saw-mill.

Interrogative 11. State who built said flouring mill on Willow Creek, in said Gallatin County, and under what contract or agreement (if any) said mill was built; what was the extent of such interest. State all you know in connection with said contract; state fully what interest you had (if any) in said flouring mill on Willow Creek, in said Gallatin County, and how you disposed of your interest therein. And, if so, to whom and for what consideration did you dispose of the same?

Answer. Myself and Andrew J. Davis built the said mill under
52 contract as recorded in Bozeman, Gallatin County, Montana Territory, in the county clerk's office. Each had a one-half interest. I had one-half interest in the said flouring mill on Willow Creek, in Gallatin County. I sold my interest to Sarah J. Fredericks for two thousand dollars lawful money of the United States of America.

(Objection.)

Interrogati'n 12. State anything else you may know and anything that you have heard Davis say that will be of advantage to the plaintiff.

Answer. In June of A. D. 1875, I heard Davis say he would break them up in business, Sarah J. Fredericks and W. A. Fredericks, if it cost him ten thousand dollars to do so.

(The defendant objected to the above question and the response thereto by the witness, which objection was sustained by the court.)

Cross-interrogatories propounded to William H. Drew on the part of the defendant Andrew J. Davis.

Interrogatory 1. You will please state your age, name, and place of residence.

Answer. William H. Drew; age, 54 years; reside in Greenwood, Mohave County, Arizona Territory; am a farmer.

53 Interrogatory 2. Where did you reside in the years A. D. 1868, 1869, 1870, 1871, 1872, and 1873?

Answer. In Montana Territory, Gallatin County.

Interrogatory No. 3. Was you acquainted during any of these years with Andrew J. Davis, Wellington A. Fredericks, and Sarah J. Fredericks (his wife), plaintiff in this action.

Answer. I was acquainted with them.

Interrogatory No. 4. Where did the plaintiff, Sarah J. Fredericks, Wellington A. Fredericks, and the defendant Andrew J. Davis reside during the years from 1868 to 1873 inclusive, and in what business were they engaged?

Answer. During that time Sarah J. Fredericks and Wellington A. Fredericks resided in Gallatin County, Montana Territory, except a portion of one year. I think 1872 they were at Helena, Montana Territory, working for A. J. Davis. Andrew J. Davis resided during that time at Helena.

Interrogatory 5. State what knowledge you have in relation to a certain saw-mill in Gallatin County, Montana Territory, owned in 1871 and prior to that time by defendant Davis, and where the same was situated and of what value it was.

54 Answer. Said mill was situated about 3½ miles east of Bozeman, in Gallatin County, Montana Territory, and valued at two thousand dollars.

Interrogatory 6. State if you at any time purchased any interest in said saw-mill. And, if so, what interest, and from whom did you purchase the same, and what was the consideration?

Answer. I purchased of A. J. Davis (½) one-half interest for one thousand dollars.

Interrogatory 7. Who owned the other one-half interest and to whom was it conveyed, if at all?

Answer. Andrew J. Davis, and he conveyed it to Sarah J. Fredericks?

Interrogatory 8. If you state that you purchased an undivided one-half of said mill from the defendant Davis, and that he conveyed the same to you; and if you state in answer to interrogatory No. 7 that the other half of said mill was conveyed to the plaintiff, Mrs. Sarah J. Fredericks, you will state if you know the same was conveyed by Davis to the said plaintiff in this suit?

Answer. I saw the conveyance.

Interrogatory No. 9. You will state if you were present when said one half of said mill was conveyed by defendant A. J. Davis to the plaintiff, Sarah J. Fredericks, and who else was present besides yourself.

55 Answer. I was present, also W. A. Fredericks.

Interrogatory 10. State in full and with particularity any and all conversation that occur'ed in your presence between the defendant Davis and W. A. Fredericks in reference to the conveyance of said one-half of said saw-mill to Mrs. Fredericks, and in reference to the ownership of the same at the time said conveyance was made, and immediately prior thereto. Witness will state, as fully as his recollection serves him, what each party said in that connection in reference to said half interest in said mill and the disposition thereof.

Answer. I have no recollection of any conversation.

Interrogatory 11. State if the plaintiff is the wife of W. A. Fredericks, and if at any time after the conveyance of said saw-mill property you had any conversation or conversations with the plaintiff and said W. A. Fredericks, or with the said W. A. Fredericks in the presence and hearing of the said defendant, in reference to the ownership of said half of said saw-mill, you will please state when and where each conversation occurred as well as your recollection may enable you to do, and what was said in each conversation and by whom said.

Answer. She is. I do not now recollect any conversation with
56 either Mr. W. A. Fredericks or with his wife, Sarah J. Fredericks, in regard to the ownership of said saw-mill.

Interrogatory 12. State who constructed, possessed, and worked and used the said saw-mill while you owned any interest in the same and for whose benefit the same was used.

Answer. I possessed, worked, and received the benefits of it.

Interrogatory 13. If your answer to the preceding interrogatory you state that you purchased an undivided one-half of said saw-mill from defendant Davis, you will state if at any time thereafter you acquired any other or greater interest in said saw-mill; and, if so, what other interest and from whom you acquired it, when acquired, and what was the consideration you gave for the same, and with whom did you make trade for the same?

Answer. I acquired a greater interest. I bargained with Sarah J. Fredericks for her one-half interest in said saw-mill in December of A. D. 1873, shortly after we traded back.

Interrogatory 14. If in your answer to the next preceding interrogatory you state that you did afterwards acquire the other half in-
57 terest in said saw-mill, you will state to whom you conveyed the said half interest in said grist or flouring mill, and at whose request you so conveyed it and for what purpose it was so conveyed.

Answer. On March 30th, 1874, I made a trade with Mrs. Sarah J. Fredericks. I purchased her one-half interest in the said saw-mill and its appurtenances for two thousand dollars, in notes and reliable paper, and at the same time sold her, for cash, my right, title, and interest to the said Willow Creek grist or flouring mill, together with all the appurtenances thereunto belonging, including the dam, water-power, outbuildings, and their various connections for her own use and benefit.

Interrogatory 15. State where the grist mill is located, of which you conveyed one-half to the plaintiff, and by what name it is known and who owned the other half interest.

Answer. It is located at the right of the cannon, on Lower Willow Creek, in Gallatin County, Montana Territory, and is known as the Willow Creek grist-mill. The other half interest was owned by A. J. Davis.

Interrogatory 16. If in your answer to interrogatory 14 you
58 state you conveyed the half interest in the grist-mill and its appurtenances to Mrs. Sarah J. Fredericks, the plaintiff in this action, you will state what statements were made, if any, to you or in your hearing by the plaintiff, Mrs. Sarah J. Fredericks, and W. A. Fredericks, or either of them, at the time of such conveyance or afterwards, to the ownership thereof and what reason, if any, were assigned by them or either of them, for having the same conveyed to plaintiff. Please state the time and place of any such statements or conversation as near as may be, and state all that was said by all the parties in such conversation as fully as remembered.

Answer. No conversation to my knowledge in regard to ownership or why the conveyance was to the plaintiff ever had.

Lastly. Do you know of anything concerning the matter in question that may tend to the benefit and advantage of said defendant, Andrew J. Davis? If so, declare the same fully and at length, as if you had been particularly interrogated concerning the same.

Answer. I do not.

WILLIAM H. DREW.

TERRITORY OF ARIZONIA,
County of Mohave:

59 I, R. R. Banker, a justice of the peace in Mineral Park precinct, in and for the county of Mohave and Territory of Arizonia, do hereby certify that the witness in the foregoing deposition named was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition taken at the time and place mentioned in the annexed notice and commission, to wit, at my office in Mineral Park precinct, Mohave County, Arizonia Territory, and on the 10th day of February, A. D. 1877, between the hours of 2 o'clock, p. m., and 10 o'clock, p. m. of that day; that said deposition was reduced to writing by me, and when completed was by me carefully read to said witness, and being by him corrected was by him subscribed in my presence.

In witness whereof I have hereunto subscribed my name and affixed my seal this 10th day of February, A. D. 1877.

R. R. BANKER, [SEAL.]
Justice of the Peace in Mineral Park Precinct,
Mohave County, Arizonia Territory.

TERRITORY OF ARIZONA,
County of Mohave, ss:

I, Caldwell Wright, recorder of Mohave County, Arizonia Ter-
60 ritory, hereby certify that R. R. Banker, before whom the annexed deposition was made and executed, and who has thereunto subscribed his name, was at the time of so doing a justice of the peace in and for Mineral Park precinct, Mohave County, Arizonia Territory, duly commissioned and sworn, and that his signature hereto is genuine.

In witness whereof I have hereunto set my hand and affixed my official seal this 13th day of February, A. D. 1877.

[L. S.] CALDWELL WRIGHT,
County Recorder.
By H. BUCKSBANNE, *Deputy.*

In the first judicial district court Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS ET AL., DEFENDANTS.

Be it remembered that pursuant to the notice hereunto annexed, and on the 21st day of October, A. D. 1876, at my office in the county of Madison, Montana Territory, before me, Jacob Housel, a notary public in and for said county, personally appeared George L. Kent, a witness produced on behalf of the plaintiff in the above-entitled action,
61 now pending in said court, who being by me first duly sworn, was then and there examined and interrogated by me, the aforesaid notary public, and testified as follows, to wit:

Question 1. What is your name, age, and place of residence, and occupation?

Answer. My name is George L. Kent; age, thirty-four years; place of residence, Madison County is and has been my place of residence for some months; mining is at present my occupation.

Question 2. Are you acquainted with Sarah J. Fredericks, the plaintiff in the cause now pending in Gallatin County in the first judicial district of Montana Territory, wherein Sarah J. Fredericks is the plaintiff and Andrew J. Davis and Caleb Gilbert are defendants?

Answer. I am acquainted with Sarah J. Fredericks.

Question 3. When and where were you acquainted with her?

Answer. I have been acquainted with her for several years in Gallatin County, Montana Territory.

Question 4. Are you acquainted with the above-named defendants, viz, Andrew J. Davis and Caleb Gilbert?

Answer 4. I know Andrew J. Davis; can't say when or where I first became acquainted with him; don't know that I ever saw Gilbert.

62 Question 5. Have you any knowledge as to who built the flouring mill known as the Willow Creek mill, situate on Willow Creek in Gallatin County, Montana Territory? State, if you know, under what contracts or agreement (if any) the said mill was built. State fully all you know about it and in this connection.

Answer 5. I have full knowledge about the building of said mill. William H. Drew furnished all the lumber. He furnished everything except a portion of the machinery, and put up the mill and put the mill in complete running order Said Drew also put up and built the mill-dam and mill-race; the said Andrew J. Davis furnished a portion of the machinery for said mill, and when the mill was completed said

Drew and Davis were to own the mill, each an undivided half interest, or were equal owners in said mill.

Question 6. Were you employed at any time to haul lumber to be used in the construction of the aforesaid mill? If so, who employed you, and who paid you for your work and services; where did you haul said lumber from and where did you haul or deliver it; what time was said lumber hauled?

Answer 6. I was employed to haul lumber for the aforesaid mill. William H. Drew employed me to haul it; said Drew also paid
63 me for the hauling of said lumber; the lumber was hauled from the saw-mill on Middle Creek, in Gallatin County. It was hauled to where the said flouring mill now stands on Willow Creek; said hauling was done in the fall of A. D. 1872. I believe some of the lumber was hauled in the winter or spring of A. D. 1873.

Question 7. In what manner, or in what way were you paid for the above, said hauling and services?

Answer. I took a horse of said Drew, some money, and took his note of hand for the balance.

Question 8. Have you any knowledge as to who owned the same mill at the time you hauled the aforesaid lumber? Do you know who controlled and operated the said mill from which you hauled the aforesaid lumber? Did you ever work at or about said saw-mill; if so, who employed you and who paid you for your work or services at or about said saw-mill?

Answer. My understanding was that the said saw-mill was owned by William H. Drew and Sarah J. Fredericks; the said Drew controlled and operated said mill, and the business about said saw-mill; she said Drew hired and paid me for my work and services at and about said saw-mill in the years of A. D. 1872 and 1873.

64 Question 9. Do you know of any other persons being employed by the said Drew to work in and about said mill?

Answer. I know of several, viz, John Knolls, Jack Wilson, and several others whose names I do not now recollect.

(Signed) GEORGE L. KENT.

MONTANA TERRITORY,
Madison County:

I, Jacob Housel, a notary public in and for the county of Madison, Montana Territory, do hereby certify that the witness in the foregoing deposition named was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was by me taken at the time and place mentioned in the annexed notice, to wit, at my office in Norwegian Gulch, Madison County, Montana Territory, and on the 21st day of October, A. D. 1876, between the hours of 9 o'clock a. m. and 5 o'clock, p. m. of that day, that said deposition was by me reduced to writing, and when completed was by me carefully read to said witness, and being by him corrected was by him subscribed in my presence.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this 21st day of October, A. D. 1876.

[L. S.] JACOB HOUSEL,
Notary Public.

65 MONTANA TERRITORY,
Gallatin County, ss:

In the district court of the first judicial district.

SARAH J. FREDERICKS
vs.
ANDREW J. DAVIS & CALEB GILBERT.

To Mes's. Chumasero & Chadwick and Samuel Word, attorneys for defendant:

GENTLEMEN: You will please take notice that the depositions of George L. Kent, William Walkins and Franklin Bucker, witnesses on the part of the plaintiff, to be read in evidence on the trial of the above-entitled cause, will be taken at the residence of Jacob Housel, on Norwegian Gulch, in the county of Madison, Montana Territory, on Saturday, the 21st day of October, A. D. 1876, between the hours of 9 o'clock a. m. and 6 o'clock, p. m. on said day, and that the taking of said depositions, if not completed on that day, will be continued from day to day successively thereafter until completed.

JOHNSON & TOOLE,
SANDERS & CULLEN,
Att'ys for Pl'ff.

LEWIS & CLARKE COUNTY, *ss:*

W. E. Cullen, being first duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that the above
66 named George L. Kent, William Walkins, and Franklin Bucker are material witnesses for the plaintiff in said action, and that said witnesses all reside in the county of Madison, M. T., and not in said county of Gallatin wherein this action is pending.

W. E. CULLEN.

Subscribed and sworn to before me this 12th day of October, A. D. 1876.

(Signed) A. CARMICHAEL,
Probate Clerk.

The plaintiff then read in evidence the deposition of Wm. H. Myers, except that portion of said deposition relative to the value of real property which was by the court suppressed.

WILLOW CREEK, *April 4th*, 1876.

Mr. A. J. DAVIS or VIVION:

You are hereby notified that I will, upon five days' notice, ask the court to grant a commission to take the deposition of William H. Myers, of Waldron, Kankakee County, Illinois, to be used in the case of Sarah J. Fredericks, plaintiff, and Andrew J. Davis, defendant, the commission to issue to Robert Ranny, a justice of the peace and notary, residing at Waldron, Kankakee Co., Illinois.

(Signed) SARAH J. FREDERICKS.

67 Question 1. What is your name?
2. What is your age?
3. Where do you reside?

4. Do you know the plaintiff in this action, Sarah J. Fredericks?
5. Is she the wife of W. A. Fredericks; if so, state?
6. Is Sarah J. Fredericks the daughter of Caleb C. Gilbert, formerly of Belleville, Hastings County, Canada?
7. Do you know of Sarah J. Fredericks receiving from her father Caleb C. Gilbert money or other property? If so, state what it was.
8. Do you know of her receiving money from any other persons or source; and if so, state the amount?
9. Did you ever transact any business for your sister-in-law Sarah J. Fredericks?
10. State about how much money she was possessed of in her own right, independent of her husband?

In Gallatin district court, Montana Territory.

SARAH J. FREDERICKS
vs.
ANDREW J. DAVIS & CALEB GILBERT.

The people of the Territory of Montana, I, Robert Ranny, a justice of the peace & notary, Waldron, Kankakee County, Illinois, greeting:

68 Whereas it appears that William H. Myers is a material witness in a certain action now depending in our said district court between Sarah J. Fredericks, plaintiff, and Andrew J. Davis and Caleb Gilbert, defendants; and that the personal attendance of said witness cannot be had at the trial of said action, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint, you a commissioner to examine said witness, and therefore we authorize and empower you, at a certain day and place to be by you for that purpose appointed, to administer all necessary oaths and diligently to examine said witness on the interrogatories annexed to this commission, and cause the said examination of the said witness to be reduced to writing and signed by the same witness and by yourself, and then return the same, annexed to this commission, unto our district court aforesaid, at Bozeman, M. T., by mail, with all convenient speed, under your seal.

Witness Hon. Henry N. Blake, judge of said 1st judicial district, this 11th day of April, A. D. 1876.

Witness my hand and seal the day last aforesaid.

[L. S.] W. F. DAVIS, *Clerk.*

69 Deposition of William H. Myers, of Kankakee County, of the State of Illinois, a witness, age forty-five years, produced, sworn, and examined before Robert Ranny, a notary public in and for the county and State aforesaid, on the first day of May, A. D. 1876, at the office of the said Robert Ranny, a notary, in the town of Norma, in said county, by virtue of a commission issued by Henry N. Blake, judge of the first judicial district, the 11th day of April, A. D. 1876, to me directed, for the examination of the said William H. Myers, a witness in a suit depending before said judge between Sarah J. Fredericks, plaintiff, and A. J. Davis et al., defendants.

First. To the first interrogatory deponent says:

I am William H. Myers.

Second. To the second interrogatory the deponent says:

I am forty-five years old.
Third. To the third interrogatory this deponent says:
I live at Waldron, Kankakee County, State of Illinois.
Fourth. To the fourth interrogatory this deponent says:
Yes.
Fifth. To the fifth interrogatory this deponent says:
Yes; she is.
Sixth. To the sixth interrogatory this deponent says:
Yes.
70 Seventh. To the seventh interrogatory the deponent says:
Yes; one hundred and fifty dollars, and other property, personal, to the amount of one hundred and fifty dollars; and he also deeded property in the State of Wisconsin for her benefit, said to be worth ten thousand dollars.
Eighth. To the eighth interrogatory deponent says:
Yes; she received five hundred dollars from A. J. Davis in A. D. 1866; from her mother, Mrs. Sarah Gilbert, in A. D. 1868, the sum of one thousand dollars.
Ninth. To the ninth interrogatory this deponent says:
Yes.
Tenth. To the tenth interrogatory this deponent says:
Between twenty-five hundred & three thousand dollars.
(Suppressed by the court.)

STATE OF ILLINOIS,
Kankakee County, ss:

I, Robert Ranny, a notary public of said county, do hereby certify that the foregoing deposition was taken by me at the time and place mentioned in the caption thereof; that the said witness was first sworn, and that after said deposition was written it was carefully read to said witness, and he then signed the same.
Witness my hand and seal this the first day of May, A. D. 1876.
[L. S.] ROBERT RANNY, *N. P.*

71 MARK LEDBETTER then testified: I hauled lumber to the grist-mill in A. D. 1873, from the saw-mill—about 8,000 feet for Mr. Drew; Drew paid me. I hauled water-wheel from Union mills to the Willow Creek mill; Drew paid me.

WILLIAM HERRON testified: I hauled lumber from saw-mill to grist-mill for Mr. Drew; Drew employed and paid me $60 or $70; hauled at $8.00 per thousand feet.

On cross-examination witness said: I hauled in summer of A. D. 1873. I made the contract with Drew.

MICHAEL LANE testified: I worked on the grist-mill in A. D. 1873; worked off and on during 2 or 3 years; worked for plaintiff; she employed me. I was first employed by Mr. Drew. After plaintiff come out I worked for her from the time she acquired her interest in the grist-mill; she paid me.

Cross-examination:

Drew hired me at $50 per month; had no understanding with Drew when I was to be paid; was paid in 1874 & 1875; got all my pay at one time; don't know how much I got; don't know where plaintiff got money to pay me. I gave no receipt and had no note.

72 O. ELLISON testified: I worked at the mill in June A. D. 1874, laying up wall. I worked on dam about 78 days, at $3.00. Plaintiff paid me; worked 52 days more, at $2 00.

Cross-examined:

I don't know where the money came from that she paid me. She seemed to have charge of the mill. Fredericks did the work and managed the mill.

W. A. FREDERICKS testified: I heard A. J. Davis testify. I commenced work in July, A. D. 1872, and worked in the mill late in the fall; then went to Helena and worked for defendant Davis. I never told Davis that I was at work to raise money to pay the hands on the grist-mill. He only paid me $10.00. I had no conversation with Davis in regard to building the mill. No conversation occurred between myself, Drew, Davis, and plaintiff in A. D. 1872, in regard to grist-mill. I had no interest in either saw or grist mill. Plaintiff did not say that she had taken deed in her name to keep Thomas from getting the property.

Plaintiff here introduced the lease from Davis to Fredericks, which is as follows, to wit:

HELENA, *November* 14, 1873.

73 Memorandum of agreement made and entered into this day between A. J. Davis and W. A. Fredericks. Said Davis has this day leased his one undivided half of his flouring mill on Willow Creek, in Gallatin County, Montana Territory, for the full term of twelve months from this date, and the said Fredericks agrees to deliver or store for said Davis the one-fourth of the gross earnings of the entire mill in wheat and screanings or bran, and at whatever time said Davis desires his portion of the wheat ground, to grind the same for him free of charge, by said Davis furnishing sacks for same. Said Fredericks is to be at all expense of running mill and keeping the same in repairs.

A. J. DAVIS.
W. A. FREDERICKS.

From date of lease I run the mill as miller. After plaintiff purchased Drew's interest in the mill she run her half; she attends to her own business. Plaintiff paid Drew $2,000 after paying some of his debts on the mill, nearly all men for labor. Defendant Davis commenced boarding with me in July, A. D. 1868, and continued until A. D. 1872; boarded about half of the time. Plaintiff ordered Davis to get carpet and stove. Plaintiff did his washing and cooking.

74 Cross-examined:

There was no property traded in the month of March, A. D. 1874, sale; plaintiff paid $2,000.00 in money and some debts. She had brought the money from the States and kept it with her, save the time she let Drew have $1,500.00, which he borrowed in August, A. D. 1871, and paid in October, A. D. 1872. She did not let me have any money. I don't know how much she brought to the country. Drew paid her one per cent. interest per month. I was boss workman on the mill; the lumber in the mill cost $3,000.00, labor $2,000.00, and machinery was one-half of cost of mill. Drew was to put up the mill and Davis to furnish machinery for one-half of the mill. I had no interest in the grist-mill, and have no recollection that I wrote otherwise to defendant Davis.

Question was 'ked witness by defendants' attorneys whether he had

not at various times in A. D. 1872 and 1873 written to the defendant, Davis, in which he spoke of his and Drew's interest and of his paying the hands; also whether he had not written defendant Davis in April, A. D. 1874, asking for a job, so that he could get money to pay the hands on the mill. Witness stated that he did not recollect that he had written several letters in A. D. 1872, and might have written
75 that he had an interest in the mill. He further said that plaintiff had no interest in the grist-mill in A. D. 1872. Letters were then shown witness, who testified that they were in his handwriting; also some letters written by W. H. Drew. Witness further testified: I knew before my wife (the plaintiff) came out to Montana that she had money and property. I was absent from her four years; we sold property in Dane County, Wisconsin, before I left there for Montana for over $11,000.00. After paying expenses and incumbrances there was $10,000.00 left, leaving each of us $5,000.00. I don't know how much she brought out here. Defendant Gilbert is her father. The defendant Davis then asked witness the following questions:

State whether or not in the month of March, A. D. 1868, in Gallatin City, in this county, you did not ask Mr. R. P. Vivion to lend you $500.00, and if you did not state to him that you wanted that money to bring out your wife to this Territory, and that your wife had no means to come out with, unless she got the money from you?

To which question the witness answered:

I did not tell Mr. Vivion that I needed the money for that purpose, and that my wife had no means. I gave Mr. Vivion the note
76 and he gave me the money in Virginia City, over the counter of Nowlan & Weary's bank. I did not get the money from Alexder Davis as agent of A. J. Davis. The property in Wisconsin was in mine and plaintiff's (my wife's) name. The money she brought out here she kept in her pocket or some secure place from then until August, A. D. 1871, when she made the loan of $1,500.00 to Drew; afterwards she kept it about her person and house until March, A. D. 1874; sometimes she had it at the head of her bed, sometimes in her pocket, and sometimes in a tin box in the cellar. She paid Mr. Lane and Bates Ryan. Drew purchased plaintiff's half interest in the saw-mill, with her interest in the tools and appurtenances thereto belonging, for two thousand dollars in money, notes, and accounts. The purchase of Drew's interest by plaintiff of the Willow Creek mill was for cash. The saw-mill had no connection with it; when the trade was completed in March, A. D. 1874, I sent plaintiff, while she was in the States, $300.00 or $500.00 by defendant Davis, in A. D. 1865. In A. D. 1868, I sent her $800.00. In '65, when I went East, I left with her $400 or $500.

On re-examination witness stated as to money, notes, and accounts of mill, she takes care of them herself. I am not conversant with
77 the two trades between plaintiff and Drew, as I did not hear the whole. As to me in regard to her business, she does as she pleases. In fall of '73 Drew and plaintiff tried to trade, but did not succeed until the spring of 1874. Plaintiff and I were married over a year before the property in Dane County, Wisconsin, was settled upon us. It previously belonged to Galeb Gilbert, the father of plaintiff.

W. L. PERKINS testified: "Knew plaintiff from A. D. 1868 till now. She has given me money to buy things for her.

On cross-examination witness stated: In 1868 she sent me to Boyce's to buy some things, and she gave me $10.00; and once she gave me $5.00, or less, to buy something; don't know when this was. Again she

gave me about $13.00 to buy something of McCormick. This was all I ever bought for her. I was at her house every week and nearly every day; I don't know that she ever had any large amount of money. She told me between 1868 and 1870 that thieves broke into the house, and she was glad they did not get her money. I at one time saw Mrs. Fredericks, either in 1868 or in 1869, have a large roll of greenbacks. I heard her say that she would never invest a dollar of her money
78 where Davis could get hold of it. I had a lawsuit 3 years ago with Davis. Plaintiff and W. A. Fredericks were my witnesses. I am not unfriendly to Davis.

BENJ. WELLS testified: In A. D. 1869 and 1870 I was doing business in Gallatin County. Plaintiff was my customer and bought calico from me. I was peddling goods. Plaintiff purchased other goods for the house during said time and paid me the money for the same.

The plaintiff then testified: I had no such conversation with defendant Davis in presence of the persons as he stated In 1873, in Helena, Mr. Davis suggested to me the propriety of purchasing Drew's interest in the mill. My husband is not conversant with my business. I paid Drew $2,000.00, and to pay debts of Drew in erecting the mill. My husband did not write the letters to Davis at my request. The claims against the mill amounted to about $7,000.00. I heard Mrs. Street's statement. I had no conversations with her of the character as she testified. When I came here my husband was helplessly involved and had not a dollar. I never said to her or any one else that the Gilbert mortgage was fraudulent.

79 On cross examination witness said: I paid Drew the $2,000.00 in cash for his interest in the flouring mill, and was to settle any unpaid indebtedness against said mill unpaid by . I paid all the indebtedness against the mill except to some parties who released their obligations against the mill in my favor. To secure a note of $2,000.00 I took a mortgage of Drew on his said mill, which was recorded in this county. I brought the $2,000.00 to Montana in A. D. 1868. I loaned Drew $1,500.00 in A. D. 1871, at one per cent. per month. I bought mill of Drew last March, A. D. 1874; paid him the $2,000.00 first days of April, A. D. 1874. I brought $3,800.00 here. I never used any money in any business until in A. D. 1874, when I paid Drew the $2,000.00.

The defendant then asked witness the cost of the mill. The plaintiff objected; the court overruled the objection, and the defendant Davis duly excepted.

On re-examination the witness testified: Mr. Samuel Word, in the winter of 1873, came to Mr. Davis' house in Helena and told Davis that he held the so-called Thomas judgment against Fredericks. He claimed that it had been turned over to him for attorneys' fees by Joseph Wilson. He wanted to know if he could get anything out of W. A.
80 Fredericks' interest in the grist mill, and Davis told him Fredericks had no interest whatever in the mill. He then asked Davis if he could garnishee Fredericks' wages. Davis said not; that they had been taken out; and Word then offered to take from Davis $150.00, which, for the judgment, Davis refused to give.

The plaintiff then introduced the following letters, to wit:

Letter dated Dec. 19, 1874, from A. J. Davis to W. H. Drew.

" " March 13, 1872, " A. J. Davis to the plaintiff.

" " May 4, 1873, " " " " W. H. Drew.
" " Jan'y 27, 1875, " " " " plaintiff.

Also 2 bills of lading, Sept'r 30, 1873; also the contract between plaintiff and W. H. Drew; also, letter dated October 1, A. D. 1872, or A. D. 1873, of Davis to W. A. Fredericks.

The plaintiff then rested.

The defendant Davis then offered in evidence the following letters, being the same or identical letters heretofore offered in evidence, and which said letters are as follows, to wit: (Here insert the portions thereof offered in evidence.) (Here defendant Davis neglected to leave the above referred to letters with the clerk to be inserted in this transcript, as instructed in the bill of exceptions.)

(Signed) A. J. MALIN,
Dep. Clerk.

81 The court thereupon admitted the same in evidence for the purpose only of contradicting the statements made by Drew in his deposition, and the statements of W. A. Fredericks on the stand for purpose of impeachment, and instructed the jury that they were not to be considered by them for any other purpose. To which ruling and decision of the court the defendant Davis then and there duly excepted.

The same were then read in evidence to the jury.

ROBERT P. VIVION then testified as follows, to wit:

I heard W. A. Fredericks' testimony in reference to borrowing money from me. In March, A. D. 1868, in Gallatin City, he came to me and said he wanted to borrow $500.00 in gold; this was between the 1st and 12th of March, A. D. 1868; he said he wanted the money for the purpose of bringing his wife from the East to Montana; that she had no means to come with and could not come unless he could get the money; I told him I would not let him have it; he said that Davis had agreed before he left to let him have the money, $500.00, to send for his wife; he came to me again, relating the same statement, and urged me to let him have the money; he said his wife had taken a notion to
82 come out here; tho' she could not come unless he could get the money, as she was without means, and he knew of no other place where he could get the money; this occurred twice or three times. I was appointed receiver by the court of the Madison Mills in a case between Davis and Wilson and was ordered to pay what money came into my hands to Alexander Davis, of Virginia City, for the defendant Davis. I told him that I was not Davis' agent, but that Alexander Davis was, and told him that I was going to Virginia City to pay some money to Alexander Davis, and he might perhaps get it from him; he then asked me to draw a note for the amount, which I did, and he asked me to recommend W. H. Drew as security, and I did so; Fredericks then went with me to Virginia City, and I paid over the money to Alexander Davis and took his receipt, signed A. J. Davis per Alex. Davis; I told him that Drew was good; I never gave one dollar in money to Fredericks at Virginia City or anywhere else.

Cross-examination:

I weighed out the gold I took with me and paid it over to Alex. Davis the day before Fredericks got the money. I think I was in the bank when Fredericks got the money. I don't think I saw the
83 note given by Fredericks to Alex. Davis from the time I gave it to Fredericks until I saw it in court.

G. D. THOMAS was then placed on the stand by defendant, and the witness having been sworn, testified as follows, to wit:

(The defendant offered to prove by him that he was the Thomas who was the owner of the judgment called the Thomas judgment against Fredericks, and had been since A. D. 1871; that Samuel Word was not the owner of the judgment, and that he had had no connection with the judgment since in A. D. 1871, and that it was unpaid, and asked the witness the facts regarding the same. The plaintiff objected to the evidence and the court sustained the objection, and the defendant Davis then and there duly excepted.)

ANDREW J. DAVIS was then recalled and testified, viz:

I heard W. H. Drew's deposition read. I did have a number of conversations with Drew; the last one was in April, A. D. 1875; he then stated in the presence of C. L. Clark and myself that the plaintiff, Mrs. Fredericks, had not one-quarter of a dollar interest in the mill. Previous to that, in a conversation with me——

(The court here stopped the witness and refused to hear the witness testify in regard to any conversations with Drew or his (Drew's)
84 declarations in regard to the matter in controversy, and excluded the evidence of said witness already given as above stated from the consideration of the jury. To which ruling of the court the defendant Davis then and there duly excepted.

The defendant then asked the witness the same questions which had been asked of him on his previous examination in this cause, and which have been heretofore inserted in this bill of exceptions and offered to prove by him that the consideration of the conveyance of July 1, 1871, from himself to Drew and the plaintiff was $1,000.00, in Drew's note for his half and the other half was held by him as trustee for W. A. Fredericks, who was the owner of one half and that no other consideration for the conveyance to Mrs. Fredericks had been paid by W. A. Fredericks, and that plaintiff never paid one cent. That the conversations with both W. A. Fredericks and W. H. Drew, after July, A. D. 1872, in which the whole matter regarding the erection of the mill and ownership was talked over, and in which it was said by both of them that the two owned one half of the mill; that the saw-mill, which was owned by Fredericks and Drew together was to furnish the lumber, and that they were jointly to do the work agreed to be done under
85 the contract with Davis, and that Drew and Fredericks were partners in the same; and further, that at the time of the conveyance to plaintiff by him of July A. D. 1871, he offered to convey the interest owned by W. A. Fredericks in the Ault saw-mill to him, and that he declined to have the conveyance in his own name, and directed the defendant to make it to his wife, the plaintiff.

The court refused to permit the witness to testify in answer to the questions asked him, and the defendant Davis then and there duly excepted.

Defendant further offered then to prove by said witness *that* conversations with said W. H. Drew prior to the time of the alleged sale to Sarah J. Fredericks, plaintiff, by Drew, in which Drew repeatedly stated that he (Drew) and Fredericks were the owners of the property.

The court refused to permit said witness to testify on those points, and the defendant Davis then and there duly excepted.)

The cause was then argued by counsel and submitted to the jury; and the court prepared and submitted to the jury the following questions to be by them answered:

In the district court of the first judicial district *court* of Montana Territory, in and for the county of Gallatin.

86 SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
ANDREW J. DAVIS & CALEB GILBERT, defendants.

Issues submitted by the court to the jury for special verdict.

1. Who owned the property in controversy in this action at the time this action was commenced?
2. What interest or share in said property was then owned by the plaintiff, Sarah J. Fredericks?
3. What interest or share in said property was then owned by the defendant Andrew J. Davis?
4. What interest or share in said property was then owned by the defendant Caleb Gilbert?
5. What interest or share in said property was then owned by Wellington A. Fredericks?

And the court thereupon gave the jury the following instructions, to wit:

In the district court of the first judicial district of Montana Territory, in and for the county of Gallatin.

SARAH J. FREDERICKS AND WELLINGTON A. Fridericks
vs.
ANDREW J. DAVIS AND CALEB GILBERT.

Instructions of the court to the jury.

87 1. Sarah J. Fredericks, on March 16, A. D. 1875, brought this action to secure a portion of certain property described in the complaint, and alleges that she owned one-half of the same, and that said Davis owned the other half thereof. Said Davis denies that said Sarah J. Fredericks has any interest in said property, and alleges that Wellington A. Fredericks is the owner of the half claimed by said Sarah J. Fredericks; that he has a valid lien thereon under a certain writ of attachment, described in his answer, and that a certain mortgage given by said Sarah J. Fredericks to said Caleb Gilbert is void.

2. Under the pleadings it is admitted that said Davis was the owner of one-half of said property at the time this action was brought.

3. You are required to find a special verdict at this time and must answer in writing the questions which have been submitted to you, and will not consider any other issues in the pleadings except as hereinafter instructed.

4. You are the exclusive judges of the credibility of the witnesses and the weight and effect of the testimony, and must consider the interests and motives of the witnesses and their means of knowledge.

88 5. If you find that said Sarah J. Fredericks was the owner of one-half of the property in controversy at the date referred to,

you need not inquire into the effect of the attachment proceedings which were instituted by said Davis against said Wellington A. Fredericks and are set forth in the answer of said Davis.

6. If you find that said Wellington A. Fredericks was the owner of one-half of said property at said time, you must find that said Caleb Gilbert had no interest in said property, by virtue of the mortgage thereon, which was executed to him by said Sarah J. Fredericks, and that said attachment proceedings of said Davis are a valid lien on the interest of said Wellington A. Fredericks.

7. Under the laws of this Territory, Mrs. Sarah J. Fredericks had the right, after the making of the declaration which is in evidence before you, to carry on the business therein described in her own name, and the property, revenue, money, debts, and credits thereof belong to her exclusively. She can manage said business and property through her husband as her agent, and her husband, in the management of such business and property, can work for her as any other person might, and his creditors would not thereby gain any right against his wife or her property.

8. It is for you to say, on the whole evidence, what shares or
89 interests in the property in controversy were owned at the time this action was commenced by the parties to this action.

Instructions offered by plaintiff, and given.

1. The defendant Davis in this case seeks to subject the property in controversy to the attachment mentioned in his answer and cross-complaint herein upon the grounds that the said property was the property of W. A. Fredericks, the husband of plaintiff, and has been conveyed to her and placed in her name for the purpose of hindering, delaying, or defrauding his, her said husband's creditors.

2. Aside from the attachment in said cause by said Davis, he has no interest in, and it is of no concern to him whether said property was, or is, in fact the property of the plaintiff or her said husband's. By his said attachment he is enabled to inquire into the fact whether or not said property was so conveyed to plaintiff for the purpose of hindering, delaying, or defrauding the creditors of her said husband; provided he has not been a party thereto, and aided or assisted the parties therein, as per instructions hereafter given you.

3. If the defendant Davis conveyed to the plaintiff and William H. Drew the saw-mill, which has been testified about, in good faith, to be her own property, for a valuable consideration, expressed in his
90 conveyance to her therefor, he is thereby estopped from denying her title to the same and gives his assent to her ownership of the said property, and any warranty of title against any one claiming under him up to the date of said conveyance would estop him from asserting or claiming that at the time of such conveyance he held a half interest in said property for her husband, in trust, so as to authorize him in this proceeding to or action to defeat her title; that is to say, if he warranted her title to the half interest in said mill to date of conveyance, he could not afterwards say it belonged to some one else at said time.

4. If, however, such conveyance for said saw-mill was made and received from said Davis to hinder, delay, or defraud the creditors of plaintiff's husband, and the title put into her name for such purpose, the said defendant Davis is in no condition to assail such means for, or contest the validity of, the same.

5. A conveyance made to cover up property, and hinder, delay, or de-

fraud creditors is good and binding between the parties and cannot be impeached by the vendor or grantor. In other words, the law will help such vendor or grantor carry it out so far as he is concerned and refuse him relief as an unfit subject for equitable favors.

91 6. In considering the question whether or not said Davis aided and assisted in covering up said saw-mill property, by conveying it to plaintiff for the purpose of hindering, delaying, or defrauding the creditors of her husband, you can consider the evidence tending to show the manner in which the title of said W. A. Fredericks, if any, to the Ault mill was held by said Davis, the conveyance of the Drew mill to said plaintiff and said Drew, contract and erection of the Willow Creek mill and property between said Davis and Drew, as well as all other facts and circumstances connected with their transactions and admitted in evidence before you.

7. If you find that what is known as the Drew saw-mill or plaintiff's interest therein was exchanged in fact for the half interest claimed by her in the Willow Creek mill and property, and that by the rules before given you said Davis is estopped from disputing said plaintiff's title to said saw-mill, he would likewise be estopped from denying her title to said Willow Creek mill and property, and it can make no difference in such case that the said plaintiff's husband worked for his said wife in and about said Willow Creek mills, or acted as her agent therein in transacting or superintending her business for her.

92 8. If from the law above given you find, as against defendant Davis, that plaintiff was at the time of the commencement of this action the owner of the half interest of the property in controversy, then no declarations, letters, or claims by her husband can deprive her of such right; such declarations, letters, &c., could never subject her property to his debts unless acquiesced in and known by her and credit had been obtained by the husband upon the strength of such representations by the husband and acquiescence of the wife, which is not claimed here.

9. The deed and conveyance in evidence before you show the legal title to the property in controversy to be in the plaintiff, and it devolves upon the defendant Davis to impeach the same and disprove said title by a preponderance of evidence.

If, from the instructions heretofore given you, you find that said plaintiff as against said Davis is the owner of the half interest of the property described in the complaint herein, you will find accordingly in the special pleadings submitted to you.

11. The execution of the mortgage to said Gilbert *as* established by the pleadings, and it devolves upon the defendant Davis to show by competent evidence, to your satisfaction, that the same is fraudulent and void; but this cannot be done by the bare declarations of the

93 mortgagors, said declarations are wholly incompetent for such purpose.

12. The same principle as laid down in reference to the conveyance of the Drew saw-mill to Drew and plaintiff by said Davis is likewise applicable to the contract between Drew and Davis for the erection of the Willow Creek mills, by the terms of which, after its completion, said Drew and said Davis were each to receive and own a one-half interest therein—the principle heretofore announced to you in reference to covering up said property for the purpose of hindering and delaying creditors, *in* which, if said Davis was a participant, would prevent him from impeaching the said contract, to which he was a party, if it was made to Drew alone to hinder, delay, or defraud Thomas or other creditors.

Instruction asked by def't Davis, and given.

The jury may give such credibility to the testimony of any witness as they see proper, and if a witness has sworn falsely in any material particular, the jury are at liberty to disregard his or her evidence altogether.

And refused to give the following instructions asked for by defendant Davis:

94 1. If the jury believe from the evidence that W. A. Fredericks caused the deed to be executed to plaintiff of one undivided half of the flouring mill, known as the Willow Creek mills, for the purpose of covering up said property and hindering, delaying, or defrauding his creditors, then such conveyance is absolutely void against the creditors of said Fredericks.

2. If the jury believe from the evidence that W. A. Fredericks was secretly the owner of any portion of the grist mill, but caused it to be deeded to his wife, the plaintiff, with a view to prevent the collection of debts existing against him, and that in truth said W. A. Fredericks was still secretly the owner of such interest at the commencement of this action, then the jury will find the said Fredericks the owner of such interest to the extent so secretly owned by him.

3. If the jury believe from the evidence that W. A. Fredericks was indebted to Thomas or other creditors and that said Fredericks was insolvent and unable to pay such creditors, and said Fredericks while so inslovent caused the deed to the undivided half of the saw-mill known as the Ault mill to be conveyed to his wife, the plaintiff, and that in reality said undivided half of said mill so conveyed belonged to the said W. A. Fredericks and was obtained by his labor or from

95 his resources, and that the entire consideration, if any, for such conveyance to plaintiff was paid by W. A. Fredericks, then such conveyance to plaintiff was absolutely void as to such creditors of W. A. Fredericks.

4. It devolves upon the plaintiff in this action to prove by a preponderance of testimony that plaintiff was the owner of the half of the flouring mill claimed by her.

5. Unless the jury are satisfied by a preponderance of evidence that the property on Willow Creek was purchased from Drew by plaintiff with her own separate money, such property will not be regarded as the separate property of plaintiff.

6. If the jury believe from the evidence that W. A. Fredericks was not working for wages in building the Willow Creek mill, but was really a secret partner in the construction of said mill, and that said W. A. Fredericks had never made a bona fide conveyance of such interest prior to the commencement of this action, then the jury will find such interest still to remain in said Fredericks.

To the giving of each of the said instructions so given by the

96 court, the defendant Davis then and there duly excepted.

And to the refusal of the court to give each one of the instructions so asked for by defendant Davis the defendant Davis at the time duly excepted.

And the jury having retired to consider of their verdict afterwards returned into court with the following verdict:

Verdict.

In the district court of the first judicial district *court* of Montana Territory, in and for the county of Gallatin.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, defendants.

Issues submitted by the court to the jury for special verdict.

1. Who owned the property in controversy in this action at the time this action was commenced?

A. J. Davis and Sarah J. Fredericks.

2. What interest or share in said property was then owned by the plaintiff, Sarah J. Fredericks?

One-half interest.

3. What interest or share in said property was then owned by the defendant Andrew J. Davis?

97 One half interest.

4. What interest or share in said property was then owned by the defendant Caleb Gilbert?

Such interest as is set forth by the mortgage.

5. What interest or share in said property was then owned by Wellington A. Fredericks?

None.

E. M. DAVIDSON, *Foreman.*

After the cause had been so submitted, the court adjourned until half past eight o'clock on the following morning, and the verdict was received by the court during the interval between the time of adjournment and the said time to which the court so stood adjourned, and afterwards, to wit, on the 17th day of May, A. D. 1877, the defendant Davis filed his motion for a new trial in the case; which motion is as follows, to wit:

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks
vs.
ANDREW J. DAVIS & CALEB GILBERT.

The defendant Andrew J. Davis comes and moves the court for a new trial in this cause for the reasons following, to wit:

98 1. Irregularities in the proceedings of the court by which this defendant was prevented from having a fair trial.

2. Accident or surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence, material for this defendant, which he could not with reasonable prudence have discovered and produced at the trial.

4. Insufficiency of the evidence to justify the findings of the jury, and that such findings are against law.

5. Errors in law occurring at the trial and excepted to by this defendant.

And said defendant hereby gives the points and specifies the grounds of his said motion, viz:

The court erred in refusing to suppress the depositions of W. H. Myers and of W. H. Drew.

2. The court erred in refusing to grant the motion of defendant Davis, for a continuance of this cause.

3. The court erred in admitting the deed in evidence offered by plaintiff, from W. H. Drew to her.

4. The court erred in admitting in evidence the papers offered by plaintiff tending to show that she was a sole trader.

4. The court erred in refusing to allow defendant's evidence
99 offered by him to prove what was the actual consideration of the conveyance dated July 1, 1871, from Drew to plaintiff.

5. The court erred in refusing to permit defendant Davis to prove that the consideration of said conveyance was paid by Fredericks from his own resources and property.

6. The court erred in refusing to permit Davis to testify in regard to his conversations with W. A. Fredericks as to what was the agreement or arrangement in regard to the erection of the flouring mill, which took place subsequent to July 1, A. D. 1872.

7. The court erred in refusing to permit plaintiff to introduce testimony of the declarations of Drew, relative to the erection of the mill, which took place subsequent to July 1, A. D. 1872.

8. The court erred in refusing to permit defendant Davis to introduce evidence as to why the conveyance of the saw-mill was made by Davis & Drew to plaintiff.

9. The court erred in refusing to permit defendant Davis to introduce evidence that he had offered to convey said saw-mill to W. A. Fredericks, and the refusal of said W. A. Fredericks to receive the same, and that he directed the same to be conveyed to plaintiff.

10. The court erred in instructing the jury to disregard all tes-
100 timony in regard to the removal of the saw-mill to Middle Creek.

10. The court erred in refusing to permit testimony of W. A. Fredericks' declarations during the time he was engaged in the erection of the mill, as to his interest in the same.

11. The court erred in overruling the objection of Davis as to the alleged conversation with Drew in June, 1875.

12. The court erred in refusing to permit defendant Davis to introduce in evidence the letters of W. A. Fredericks to him dated, respectively, Sept. 28, Sept. 2, Oct. 16, 22, 26, 28, of 1872; July 8, Oct. 26, 1873; Feb'y 10 & April 4, in 1874, and the letters of W. H. Drew to defendant Davis, respectively dated March 28, May 1, May 30, & August 20, 1874.

13. The court erred in refusing to permit plaintiff to prove the cost of the grist-mill.

14. The court erred in giving to the jury the several instructions, and each one of them, numbered 1, 2, 3, 4, 5, 6, 7, & 8.

15. The court erred in giving each one of instructions asked for by the plaintiff, and respectively numbered 1, 2, 3.

16. The court erred in refusing to give each one of the instruc-
101 tions asked for by defendant Davis, and respectively numbered 1, 2, 3, 4, 5, & 6.

17. The court erred in this, that after the cause had been submitted to the jury, and after the court had adjourned until the next morning,

and during the interval, the judge went to the room and received the verdict of the jury and caused the same to be entered on the records of the court.

A. M. WOOLFOLK,
CHUMASERO & CHADWICK,
SPRATT, EDWARDS & VIVION,
Att'ys for Def't Davis.

Which motion was overruled by the court, to which ruling defendant Davis then and there excepted.

Whereupon the following judgment and decree was made and entered in said cause, to wit:

Judgment & decree on verdict.

In the district court, first judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT AND Wellington A. Fredericks, defendants.

This cause came on regularly for trial on the question of title and partition of the property mentioned in the complaint herein, this
102 14th day of May, A. D. 1877, E. W. Toole, esq., and J. H. Shober, esq., appearing as counsel for the plaintiff, and Messrs. Chumasero, Spratt, Woolfolk, Vivion, and Edwards for the defendant Andrew J. Davis.

And a jury of twelve men having been regularly empannelled and sworn in said cause, the said jury, after hearing the evidence, argument of counsel for the respective parties, and the instructions of the court, retired under a sworn officer to deliberate on their verdict in said cause, and on the 16th day of May, A. D. 1877, the said jury returned their verdict in said cause, which is in words and figures following, to wit:

In the district court of the first judicial district of Montana Territory, in and for the county of Gallatin.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEfendants.

Issues submitted by the court to the jury for special verdict.

1. Who owned the property in controversy in this action at the time this action was commenced?

Answer. A. J. Davis and Sarah J. Fredericks.

103 2. What interest or share in said property was then owned by the plaintiff Sarah J. Fredericks?

Answer. One-half interest.

3. What interest or share in said property was then owned by the defendant Andrew J. Davis?

Answer. One-half interest.

4. What interest or share in said property was then owned by the defendant Caleb Gilbert?

Answer. Such interest as is set forth by the mortgage.

5. What interest or share was then owned by Wellington A. Fredericks?

Answer. None.

E. M. DAVIDSON,
Foreman.

Which said special findings and verdict are approved hereby by the court.

Now, on motion of Messrs. Toole and Shober, attorneys for plaintiff, it is hereby ordered, adjudged, and decreed by the court that Sarah J. Fredericks is the sole owner as of her own right of an undivided one-half interest in and to the property mentioned in the complaint herein, and known and designated as a certain flouring-mill at the upper end of Lower Willow Creek Valley, on the northeast quarter of the south-
east quarter of section seven (7), township one south, of range on'
104 east, with all the tools, implements, water right, mill-dam, and all the appurtenances thereunto belonging, all in the county of Gallatin, Montana Territory, and that Andrew J. Davis is the owner of an undivided one-half interest in and to said property; and it is further ordered, adjudged, and decreed that said Caleb Gilbert has a lien on said undivided interest of the plaintiff, in this by virtue of a certain mortgage on said undivided interest, for the sum of four thousand dollars, which said lien attached to said property on the 22d day of June, A. D. 1874, which said amount bears legal interest from date. It is further ordered and adjudged by the court that a division of said property is impracticable, and cannot be had without great injury to the parties interested. It is therefore ordered and adjudged and decreed by the court that said property heretofore described be sold at public sale, as prescribed by law and the practice of this court, by the sheriff, Gallatin County, Montana Territory, who is hereby appointed referee to make such sale; that said sale be had at the front door of the court-house, at the town of Bozeman, in the county of Gallatin, Montana Territory, on the 22d day of October, A. D. 1877, at one o'clock p. m., and that said property be sold to the highest bidder for cash in hand.
105 That said sheriff and referee bring the money realized from the sale of said property into this court, and make due report of his proceedings in relation to the sale of said property. That the proceeds of said sale be applied, under the direction of the court:

1st. To the payment of the costs and disbursements incurred in this action.

2nd. The costs of said sale.

3rd. That the residue of the one-half interest of the said Sarah J. Fredericks be applied on the said mortgage of the said Caleb Gilbert, and that the balance be paid over to the respective parties hereto in accordance with their respective interests. And it is further ordered, adjudged, and decreed by the court that the said Sarah J. Fredericks have and recover of the said Andrew J. Davis her costs and disbursements necessarily incurred in defending and establishing her right to the undivided half interest in said property contested in this cause by said Andrew J. Davis, taxed at one hundred and sixty $\frac{80}{100}$ dollars.

Given under my hand, this 17th day of May, A. D. 1877.

HENRY N. BLAKE, *Judge.*

To the entering and rendering of said judgment & decree the
106 defendant Davis duly excepted, and asks the court to sign this his bill of exceptions, which is done this 21 day of May, A. D. 1877.

Amendments hereto annexed must be incorporated.

HENRY N. BLAKE, *Judge.*

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS, CALEB GILBERT, ET AL.,
defendants.

Be it remembered that on the 24th day of October, A. D. 1876, defendant Davis filed his motion to suppress the deposition of W. H. Myers, taken in this cause on the part of the plaintiff, which motion is as follows: (Here insert motion.) Which see motion at pages 1 to 3.

Which motion was overruled by the court, and the defendant Davis then and there excepted to the decision.

The defendant Davis also, on the 8th day of May, 1877, filed his motion to suppress the deposition of W. H. Drew, taken by plaintiff; the court overruled the motion; the defendant Davis excepted, as appears by the bill of exceptions numbered 1. (Which here insert.) Which see motion & bill of exception at pages 3 to 4.

107 The defendant also filed and made motion to suppress the deposition of George L. Kent, taken by plaintiff, which said motion was overruled by the court, and the defendant Davis then and there duly excepted. Which see said motion at pages 4.

And this cause came on to be tried on the 14th day of May, A. D. 1877, that being one of the days of the May term of this court; and on said trial the plaintiff offered in evidence a certain deed from W. H. Drew and Ann, his wife, to the plaintiff Sarah J. Fredericks, which deed bears date 30th March, A. D. 1874, which deed is as follows: (Here insert deed and acknowledgement.) Which see said deed & acknowledgement at pages 4 to 7.

The defendant Davis objected to the same on the ground that the acknowledgement was defective. The court overruled the objection, and the defendant Davis then and there duly excepted, and the deed was read in evidence.

The plaintiff then offered in evidence the paper following, purporting to be the declaration of plaintiff as a sole trader: (Here insert the same.) Which said declaration see at pages 7 to 9.

To the introduction of which the defendant Davis objected, but the court overruled the objection, and the defendant then and there
108 duly excepted, and the same was introduced in evidence.

The plaintiff also introduced in evidence a certain contract entered into between William H. Drew and Andrew J. Davis relative to the erection of the mill in controversy, which is as follows, to wit: (Here insert contract.) Which see said contract at pages 10 to 12.

The defendant Davis was then called as a witness and testified as follows, to wit: Which see said testimony of A. J. Davis at pages 12 to 21.

William H. Marion testified as follows, to wit: Which see said testimony of W. H. Marion at pages 21 to .

Wm. W. Wright testified: Which see said testimony of Wm. W. Wright at pages 21 to 23.

Wm. Ryan testified: Which see said testimony of Wm. Ryan at page 23.

Marion was recalled & stated: Which see recalled testimony of W. H. Marion at page 23.

Alice W. Street was then called as a witness & testified: Which see testimony of Alice W. Street at pages 23 to 24.

Defendant Davis then offered and read in evidence the complaint, summons, affidavit, & attachment, and sheriff's return thereon,
109 in the case of Andrew J. Davis vs. W. A. Fredericks, which are as follows, to wit: (Here insert same.) Which see complaint at pages 25 to 27; summons at pages 27 to 29; affidavit for attachment at pages 29 to 30; writ of attachment at p. 30 to 31; sheriff's return 32, 33.

The witness Davis, being further examined, stated: Which see at page 33.

The defendant then introduced A. J. Malin, who testified: Which see at page 33.

Defendant Davis also offered in evidence certain letters written to him by W. A. Fredericks and W. H. Drew, as follows:

Letter of W. A. Fredericks to Davis, dated respectively Sept. 28, Oct. 16, Oct. 22, Oct. 28, May 8, Sept. 2, Dec. 11, and Dec. 12, 1872; July 8, Oct. 26, 1873; and Feb'y 7 and April 8, 1874.

Letters of Drew to Davis, dated respectively Aug. 20, May 1, May 30, and March 28, 1874.

The same being offered, as stated by Davis' attorneys, to establish the fact that said Sarah J. Fredericks was not the owner of the premises claimed by her in her complaint, but that W. A. Fredericks was the owner thereof.

The plaintiff objected to the introduction of said letters. The court sustained the objection, and the defendant Davis then and there duly excepted. Which see objection and exception, with amendments, at page 34.

110 The defendant Davis, while on the stand, was questioned by defendant Davis' attorneys relative to the declarations made by W. A. Fredericks and W. H. Drew while the mill was in course of erection, and before the conveyance of Drew's interest to plaintiff, as to Fredericks being the owner of the mill, but the court refused to allow the witness to testify on that subject, and the defendant Davis then and there duly excepted.

The defendant Davis then rested.

And the plaintiff then again placed defendant Davis on the stand, and asked him the following questions: Which see question, objection, & exception at page 34 to 35.

The plaintiff then read the deposition of William H. Drew in evidence, subject to the objections of defendant Davis to certain questions and answers marked on said deposition. (Here insert copy of said deposition, with objections marked.) Which see said deposition of Wm. H. Drew at pages 35 to 59.

The plaintiff then read in evidence the deposition of G. Kent. (Here insert copy of said deposition.) Which said deposition of Geo. L. Kent at pages 60 to 66.

The plaintiff then introduced in evidence the deposition of Wm. H. Myers, except that portion of said deposition relative to the value
111 of real property, which was by the court suppressed. (Here insert copy of said deposition, with that portion suppressed by the court so marked.) Which see said deposition of W. H. Myers as read in evidence at pages 66 to 70.

Mark Leadbeater then testified: Which see said testimony *at* of Mark Leadbeater at pages 71.

Wm. Herron testified: Which said testimony of Wm. Herron at page 71.

Michael Lane testified: Which see testimony of Michael Lane at page 71.

O. Ellison testified: Which see testimony of O. Ellison at page 72.

W. A. Fredericks testified: Which see said testimony at page 72.

The plaintiff here introduced the lease from Davis to Fredericks, which is as follows: (Here insert.) Which see said lease from A. J. Davis to W. A. Fredericks at page 72–73.

W. A. Fredericks further testified: Which see further testimony of W. A. Fredericks at pages 73 to .

W. L. Perkins testified: Which see testimony of W. L. Perkins at page 77.

Benj. Wells testified: Which see said testimony of Benj. Wells at page 78.

112 The plaintiff then testified: Which see said testimony of the plaintiff Sarah J. Fredericks at pages 78 to 80.

The plaintiff then introduced in evidence the following letters: Which see letters referred to at pages 80 to 81, and introduced in evidence.

The plaintiff then rested.

The defendant Davis then offered in evidence the following letters, being the same letters heretofore offered in evidence, which are as follows: (Here insert the portions thereof read in evidence.) Which see note of the clerk in regard to said letters at page 80; also see decision of the court and objection and exception at pages 81.

which may be awarded against him on the trial or dismissal of the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas the appellant, Andrew J. Davis, is desirous of staying the execution of the said judgment and decree so appealed from: We do further, in consideration thereof and of the premises, jointly and severally, undertake and promise, and do further acknowledge ourselves, jointly and severally, bound in the further sum of three thousand dollars, being the amount fixed by order of the judge of this court; that if the said judgment or decree appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid thereby, or such part of such amount as to which the same shall be affirmed if affirmed only in part, and all damages and costs which said plaintiff shall sustain in consequence of such appeal, not exceeding the sum of three thousand dollars.

Dated this day of May, A. D. 1877.

A. J. DAVIS. [SEAL.]
118 NELSON STORY. [SEAL.]
LESTER S. WILLSON. [SEAL.]

TERRITORY OF MONTANA,
Gallatin County, ss:

Nelson Story and Lester S. Willson, whose names are subscribed to the foregoing undertaking as sureties, being duly sworn, each for himself, says that he is a householder and freeholder in said county, and that he is worth the several amounts therein specified as the penalties thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

NELSON STORY.
LESTER S. WILLSON.

Subscribed and sworn to before me, this 22d day of May, A. D. 1877.
[SEAL.] R. P. VIVION,
Notary Public.

Approved & filed May 21, A. D. 1877.

THEO. MUFFLY, *Clerk.*

And afterwards, to wit, on the 30th day of June, A. D. 1877, the said defendant Davis filed in the office of the clerk of said district court his præcipe for transcript on appeal herein, which said præcipe is in the words & figures following, to wit:

119 In the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin.

SARAH J. FREDERICKS & WELLINGTON A. Fredericks, plaintiffs,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, defendants.

To the clerk of said district court:

You will please make out a transcript of the above-entitled cause for the supreme court, and insert therein the bill of exceptions on file in said cause, and all papers, orders, judgment, letters, and records in-

serted or included in said bill of exceptions, or referred to therein, notice of appeal, and undertaking on appeal.

CHUMASERO & CHADWICK,
SAMUEL WORD,
J. G. SPRATT,
T. R. EDWARDS & R. P. VIVION,
Att'ys for Def't Davis.

TERRITORY OF MONTANA,
County of Gallatin, ss:

I, Theo. Muffly, clerk of the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, do hereby certify that the foregoing 119 pages, numbered from 1 to 119,
120 inclusive, contain a full, true, and correct transcript of certain of the pleadings, records, and proceedings filed, made, and had in said court in the cause of Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, against Andrew J. Davis and Caleb Gilbert, defendants, except such letters as was introduced in evidence by defendant Davis.

In witness of which I hereunto set my hand and affix the seal of said court, at Bozeman City, this 17th day of July, A. D. 1877.

SEAL OF THE DIST. C'T, FIRST JUD. DIST., GALLATIN COUNTY, MONTANA TERRITORY.

THEO. MUFFLY, *Clerk*,
By AMIE J. MALIN, *Deputy Clerk.*

121 In the supreme court of Montana Territory, August term, A. D. 1877.

SARAH J. FREDERICKS, PLAINTIFF AND RESPONDENT,
vs.
ANDREW J. DAVIS AND CALEB GILBERT ET AL., DEFENDANTS AND APPELLANTS.

Be it remembered that in the present term of August, in the year of our Lord one thousand eight hundred and seventy-seven, the above-entitled action was brought into this supreme court, from the district court of the first judicial district of said Territory, in and for the county of Gallatin, by virtue of an appeal from the judgment rendered and entered therein by said district court in favor of said plaintiff and respondent, and against said defendants and appellants, agreeably to the statute of said Territory and the rules of said supreme court in such case made and provided; and the transcript of the record of said district court in said cause was duly filed in said supreme court.

And afterwards, to wit, on the 14th day of August, A. D. 1877,
122 came the said defendant and appellant Andrew J. Davis, by Messrs. Chumasero & Chadwick, of counsel, and suggests a diminution of the record filed in this cause.

And afterwards, to wit, on the 15th day of August, A. D. 1877, this cause coming on to be heard before this supreme court, upon appellant's said suggestion of diminution of the record herein; the following order was made by the court and duly entered of record, in response to said suggestion of diminution, to wit:

Order to correct record.

SARAH J. FREDERICKS
vs.
ANDREW J. DAVIS ET AL.

This cause coming on to be heard before the court, upon motion of Chumasero & Chadwick, attorneys for appellant Davis, on the 13th day of August, A. D. 1877, for an order of this court on the clerk of the first judicial district court in and for the county of Gallatin, Montana Territory, to supply certain omissions in the transcript on appeal in this cause from said district court to this court; and it appearing from the suggestion of appellant and from said transcript that the said clerk of said district court has omitted from said transcript the pleadings in said cause upon which the same was tried, and also certain letters
123 introduced in evidence by appellant Davis, written by W. A. Fredericks to appellant and by W. H. Drew to appellant, and copies of which were furnished to said clerk and endorsed filed by said clerk; it is therefore ordered that, immediately upon service of a certified copy of this order upon him, the said clerk of said district court supply the said omissions, and that he do send up a certified copy of said pleadings and of the said original letters to the clerk of this court in order that said omissions may be supplied.

Thereupon the said cause was continued until the next term, to wit, the January term, A. D. 1878, of this court.

And afterwards, to wit, on the 5th day of January, A. D. 1878, the said defendant and appellant Andrew J. Davis filed herein a supplemental transcript, containing the pleadings and letters omitted from the original transcript filed in same cause, mentioned and set forth in the suggestion of diminution of the record filed herein at the last term of this court, which said supplemental transcript is in the words and figures following, to wit:

In the district court of the first judicial district of the Territory of Montana, in and for Gallatin County.

124 SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEFENDANTS.

1. Now comes the plaintiff in the above-entitled cause and states that she is a married woman, and as such is seized and possessed, in her own right and as her sole and separate property, of an undivided one-half of the premises hereinafter mentioned. That the said defendant Andrew J. Davis is the owner of the undivided other half thereof, and that the same is held, occupied, and possessed by said plaintiff and defendant Davis as tenants in common, and that no other person has any interest therein save said Gilbert, who holds a mortgage of record for about $4,000.00.

2nd. That said property is known and designated as a certain flouring-mill, situate at the upper end of the Lower Willow Creek Valley, on the northeast quarter of the southeast quarter of section seven, township one south, of range one east, with all the tools, implements, water right, mill-dam, and all the appurtenances thereunto belonging or in anywise

appertaining, all in the county of Gallatin and Territory of Montana.

125 3. That said plaintiff and defendants are not interested in any other real property or personal property, as tenants in common or otherwise, jointly in this Territory or elsewhere.

4. That plaintiff is desirous of having partition or sale made of said property, and that plaintiff verily believes and therefore avers that partition or division thereof cannot be made accordingly to the respective interests of the parties therein without great injustice to the owners thereof.

5. And the said plaintiff, for further cause of complaint, shows unto this hon. court that since the 15th day of December, A. D. 1873, and up to the present time, there has been no settlement or accounting between this plaintiff and said defendant Davis for or on account of divers and sundry sums of money, labor, and material by them, and each of them laid out and expended in and about furnishing, operating, and taking care of said mill, mill-dam, water right, and property; and that during said time said defendant Davis became and is indebted to this plaintiff for and on account of money, work, and material paid, laid out, and expended in and about improving, preserving, and operating said property in the sum of about six thousand five hundred dollars, the one-half of which sum is $3,250.00, now owing plaintiff, over and

126 above all just claims and demands of said defendant Davis; that said amount was necessary to be expended as aforesaid in and upon said property, and that the same added greatly to the value thereof.

Whereofore plaintiff prays this hon. court that said property, and the whole thereof, be sold accordingly to the rules and practice of this court and the law applicable thereto. That the proceeds thereof, after paying the costs and expenses of sale, whatever a mount is due on said lien, to be returned unto this court, and that the same be divided and paid over to the parties hereto in accordance with their respective rights and interests in the premises. That an accounting be had between this plaintiff and said defendant Davis, and the amounts found due plaintiff be paid out of the proceeds of said sale, as in equity and justice it should be, and that judgment therefor be given accordingly; and that plaintiff have such other or further relief as may be just and equitable.

STREET, AND
JOHNSTON & TOOLE,
Atty's for Plaintiff.

TERRITORY OF MONTANA,
County of Gallatin:

Sarah J. Fredericks makes an oath and says that she is the

127 plaintiff therein; that she has heard the foregoing complaint read and knows the content thereof, and that the matters therein stated are true of her own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters she believes it to be true.

(Signed) SARAH J. FREDERICKS.

Subscribed and sworn to before me, this 15th day of March, A. D. 1877.

D. H. KETCHUM,
A Justice of the Peace in and for Gallatin, Montana Territory.

In the district court first judicial district, county of Gallatin, Territory of Montana.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, defendants.

And now comes the above-named defendant Andrew J. Davis, and for answer to the complaint herein denies that the said plaintiff, as a married woman or otherwise, is, or ever was, seized or possessed in her own right, and as her sole and separate property, or otherwise, of the property and premises mentioned and described in the said complaint.

Defendant admits that he is the owner of the undivided one-
128 half of the said premises and property, but denies that the same is owned or possessed by him as a tenant in common or otherwise with the said plaintiff. Defendant denies that no person save the said plaintiff and this defendant has any interest in the said property, save said Gilbert mentioned in the said complaint.

On the contrary, this defendant avers that W. A. Fredericks, the husband of the said plaintiff, is now, and at all times since the erection of the said mill in the said complaint mentioned has been, the owner of the undivided one-half of the said premises and property and the cotenant of this defendant.

Defendant admits that a mortgage executed by the said plaintiff to the said defendant Caleb Gilbert upon the said premises appears of record in the recorder's office of the said county of Gallatin, but defendant denies that it is any lien upon the said premises; and avers that at the time of the execution thereof the said plaintiff had no interest in the said premises, but that the said property and premises belonged to the said W. A. Fredericks, as hereinafter stated, and that there was no consideration for the execution thereof, but that the same was executed and placed upon the records of the said county of Gallatin for the purpose of defrauding, delaying, and hindering the
129 creditors of the said W. A. Fredericks, and that the same is fraudulent and void. And the said defendant, further answering, denies that he now is, or ever was, indebted unto the said plaintiff in any manner or in any sum whatever on account of work, money, or material paid, laid out, or expended in and about improving, preserving, or operating said property and said mill; denies that the said plaintiff ever paid, laid out, or expended any money or performed any work in or about improving, preserving, or operating the said property or mill, or for or about any property in which the said plaintiff or this defendant has or had any interest whatever.

And the said defendant, for further answering, avers that he and the said W. A. Fredericks are now, and since the day of November, A. D. 1873, have been, the owners of the premises and property in the said complaint described, and that on or about the date last aforesaid this defendant leased to his cotenant, W. A. Fredericks, his undivided one-half of the said mill and premises, and that he, the said Fredericks, has held and occupied the same under such lease and agreement from the date aforesaid until about the 6th day of March, A. D. 1875; and the said defendant avers and charges, for a further defense to the
130 said action, as well as for a cross-complaint or bill therein, that the said mill was contracted and erected, and the materials therefor, together with the appurtenances, with the means of the said W. A.

Fredericks and this defendant; that the said plaintiff in this action had no estate, real or personal, in her own right or otherwise, and was then the wife of the said W. A. Fredericks, and did not contribute any sum whatever towards the erection of the said mill and premises, and that the said W. A. Fredericks was, at the time of the erection, the owner of the said mill and premises, and ever since has been.

And defendant further avers that at the time of the erection of the said mill, and the acquiring of the title thereto and the premises connected therewith, the said W. A. Fredericks was justly indebted unto this defendant and divers and sundry other parties in large sums of money, and that for the purpose of defrauding, hindering, and delaying this defendant and the other creditors caused a conveyance of the said mill to be made to the said plaintiff, then the wife of the said W. A. Fredericks; and that he, the said Fredericks, has remained in the possession thereof since the aforesaid day of November, A. D. 1873.

131 And defendant further avers that the said W. A. Fredericks so held and retained the interest of this defendant in the said mill and premises as such lessee until the 6th day of March, A. D. 1875, when the said lease therefor ceased and determined; and that, on or about the day last above named, this defendant demanded of the said W. A. Fredericks, who was then in the possession of his undivided one-half of the said mill and premises, and into the possession jointly with the said W. A. Fredericks of the whole of the said premises as a tenant in common of the said Fredericks, but that the said Fredericks then and there refused to admit this defendant into the joint possession with him of the said mill and premises or any part thereof, and that the said Fredericks refused to allow or admit the said defendant into the possession of the same or any use and enjoyment thereof, but wholly excludes the defendant from such possession. That the said mill is a flouring-mill, and is very valuable for the purpose of grinding grain and producing flour; that there is now, and has been since the said date of the exclusion of this defendant from the said mill, an abundance of grain to be ground at said mill; and that the use of the same is very valuable.

132 And the said defendant avers that the said W. A. Fredericks is insolvent and unable to pay his outstanding indebtedness. Said defendant further avers that the said mill and premises cannot be divided; that there are no valid liens or incumbrances upon the same.

Defendant further avers that unless a receiver be appointed to take possession of the said property, to run said mill, and operate the same, he will suffer great and irreparable injury. Wherefore this defendant prays that the said W. A. Fredericks may be made a party to this action; that he may be ordered and required to answer this cross-complaint; and that this honorable court may appoint a receiver to take possession of the said property and premises, and hold and receive all the rents, issues, and profits thereof until a final hearing and determination of the rights of the parties in and to the said premises; and that upon a final hearing, sale of the said premises, and all property connected therewith, may be made in manner provided by law; and that the proceeds of such sale be brought into court to await the order of distribution thereof, and for such other and further relief as may be just and equitable; and for judgment for costs of action.

(Signed) CHUMASERO & CHADWICK,
Att'ys for Def't.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

133 Andrew J. Davis, being first duly sworn, deposes and says that he is the defendant named in the said action; that he has heard the foregoing answer and cross complaint read, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

(Signed) A. J. DAVIS.

Subscribed and sworn to before me, this 5th day of March, A. D. 1875.
[SEAL.] W. F. CHADWICK,
Notary Public.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, hereby certify and return that I served the answer and cross-complaint to which this is attached upon the within-named Sarah J. Fredericks and W. A. Fredericks on the 13th day of April, 1875, in the said Gallatin County, by reading the same to each of them, and also by delivering a copy of the same to the said W. A. Fredericks.

Witness my hand, this the 14th day of April, A. D. 1875.

(Signed) C. L. CLARK,
Sheriff.

Answer of W. A. Fredericks to cross-complaint of defendant Andrew J. Davis.

In the district court of the 1st judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
134 *vs.*
ANDREW J. DAVIS ET AL., DEFENDANTS.

Now comes W. A. Fredericks, and for answer to the cross-complaint of Andrew J. Davis in the above-entitled cause denies that he was or is indebted to said Davis in any sum whatever denies; that he ever conveyed or caused said mill or premises to be conveyed to said plaintiff to hinder, delay, or defraud any creditors or said Davis; denies that he ever conveyed the same or any part thereof to plaintiff, or ever caused it to be done; denies that he had or has any interest in said property, save as a lessee of said Davis; denies that he ever contributed to the construction or erection of said mill or premises with his own means; denies that he ever refused to redeliver and return said Davis his half of said mill so leased of him, and avers that he always has been and now is ready so to do; denies that unless a receiver be put in said mill that said Davis will sustain any damage or injury; denies that it will be profitable to run and operate said mill from thence during the present summer, and avers that the same would result in great loss; denies any and all fraud or collusion between him and said plaintiff, and charges and avers that he never at any time had or held any
135 right, title, or interest in the said half interest in said mill and premises claimed by his said wife, Sarah J. Fredericks, and that the same is and always hath been her sole and exclusive property.

Wherefore this defendant asks judgment for his costs in this behalf expended.

(Signed) J. H. D. STREET,
Att'y for Def't.

TERRITORY OF MONTANA,
County of Gallatin, ss:

W. A. Fredericks makes oath and says that he has heard the foregoing answer read, knows the contents thereof, and that the matters therein stated are true of his own knowledge.

(Signed) W. A. FREDERICKS.

Subscribed and sworn to before me, this 24th day of April, A. D. 1875.

D. H. KETCHUM,
A Justice of the Peace in and for Gallatin County, Montana Territory.

Replication.

In the district court of the first judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF, *vs.* ANDREW J. DAVIS AND CALEB GILBERT, defendants. } Pl'ff's replication.

Now comes the above-named plaintiff, and for replication to
136 the new matter set up in the answer of the defendant Davis, and for answer to his cross-complaint in the above-entitled cause:

1st. Denies that W. A. Fredericks, the husband of this plaintiff, is now or ever has been the owner of one undivided half interest or any interest whatever in the property mentioned in the said complaint, or any part thereof, or that he is jointly or otherwise interested with the said defendant Davis or this plaintiff.

2nd. Denies that the mortgage mentioned was without consideration; denies that the same was executed to hinder or delay or defraud any creditor or creditors of the said W. A. Fredericks; denies that the same is null or void, and avers that the property so mortgaged was and is the sole property of this plaintiff.

3. Denies that the same said mill was constructed, or any materials or appurtenances therefor, or any part or portion thereof, were furnished of or with the means of the said W. A. Fredericks.

4. Denies that plaintiff did not contribute to the building and erection of said mill, and avers that she purchased a half interest therein before the same was completed, and furnished and provided all the material and appurtenances therefor with her own means, and constructed
137 and erected said mill, save and except the machinery therefor, which was furnished by said Davis, by reason of which, and his contract in the premises, he became the owner of the undivided half of said and premises so leased by him to the said W. A. Fredericks.

5. Denies that said Fredericks is or was indebted to said plaintiff in any sum whatever; denies that he ever conveyed or caused said mill to be conveyed to plaintiff for the purpose or with the intention of hindering or delaying any of his creditors, or that he ever did convey or cause said mill or any part thereof to be conveyed to plaintiff, or that he has or had any possession or right of possession thereto, save and except

under and by virtue of his lease to one-half interest therein from said Davis; denies all fraud or collusion whatever.

6. Denies that said Davis was at any time or now is entitled to the joint possession of said mill and premises with said W. A. Fredericks, and charges that and avers that, ever since the termination of the lease so made by said Davis to said Fredericks, said Fredericks, as well as this plaintiff, have been ready and willing and desirous for said Davis to enter into possession of his half of said mill, and have notified and requested him so to do.

7. Denies that there has, since the date mentioned in said cross-
138 complaint, or now is, an abundance of grain for said mill to grind, or that there is or will be until after the coming harvest a sufficient quantity to make the running of said mill profitable.

8. Denies that unless a receiver be put into said mill said defendant Davis will sustain great or irreparable damage or injury, or any damage or injury whatever.

And the said plaintiff further charges and avers that the costs and expenses attending the services of a receiver in and about said mill will, during the present summer, exceed the profits of said mill; that when there is grain to run and operate said mill the same is carefully, skillfully, and economically run and operated; and that this plaintiff is willing and desirous that said defendant Davis have some competent person to take possession of and operate his half of said mill, and to take, have, and receive his half of the proceeds thereof, at his own cost and expense. Wherefore plaintiff asks judgment as prayed for in her complaint.

S REET, &
(Signed) JOHNSTON & TOOLE,
Attorney for Plaintiff.

TERRITORY OF MONTANA,
County of Gallatin, ss:

Sarah J. Fredericks makes oath and says that she is the plaintiff herein; that she has heard the foregoing replication to defendant
139 Davis' answer and answer to his cross-bill read, and knows the contents thereof, and that the matters therein stated are true of her own knowledge.

(Signed) SARAH J. FREDERICKS.

Subscribed and sworn to before me, this 12th day of December, A. D. 1878.

W. F. DAVIS, *Clerk.*

Amended answer of A. J. Davis.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEFENDANTS. } Amended answer.

In the 1st judicial district court, within & for Gallatin County, Montana Territory.

And now comes the above-named defendant Andrew J. Davis, and by leave of the court, and for amended answer to the said plaintiff's complaint filed herein, denies that the said plaintiff, as a married woman, sole trader, or otherwise, is, or ever was, seized or possessed in her own

right, and as her own and separate property, or otherwise, of the property or premises mentioned and described in her said complaint. Defendant admits that he is the owner of the undivided one-half of the said premises and property, but denies that the same is owned or possessed by
140 him as tenant in common or otherwise with the said plaintiff. Defendant denies that no person save the said plaintiff and this defendant has any interest in the said property, save said Gilbert, mentioned in the said complaint. On the contrary, this defendant avers that W. A. Fredericks, the husband of the said plaintiff, is now, and at all times since the erection of said mill in the said complaint mentioned has been, the owner of the undivided one-half of the said premises and property and the cotenant of this defendant. Defendant admits that a mortgage executed by the said plaintiff to the said defendant Caleb Gilbert upon the said premises appears of record in the recorder's office of the said county of Gallatin, but defendant denies that it is any lien upon the said premises, and avers that at the time of the execution thereof the said plaintiff had no interest in the said premises belonging to the said W. A. Fredericks, as hereinafter stated, and that there was no consideration for the execution thereof, or that the same was ever delivered to the said Gilbert, and that the same was, without the knowledge or consent of the said Gilbert, executed and placed on the records of the said county of Gallatin for the purpose of hindering delaying, and defrauding this defendant and other creditors of the said W. A. Fredericks, husband of the said plaintiff, out of their just debts and demands
141 owing as aforesaid, and for that reason the same is fraudulent and void. And the said defendant, further answering, denies that he was, is, or ever was indebted unto the said plaintiff in any manner or in any manner or amount whatever, or in any sum, or at all, on account of work, money, or materials paid, laid out, or expended in or about the improving, preserving, or operating said property and said mill; denies that plaintiff ever paid, laid out, or expended any money or property or performed any work in or about improving, preserving, or operating the said property or mill, or for or about any property in which the said or the defendant has or had any interest whatever. And the said defendant, further answering, avers that he and the said W. A. Fredericks are now, and since the day of November, A. D. 1873, have been the owners of the premises and property in said complaint described, and that on or about the date last aforesaid this defendant leased to his cotenant, W. A. Fredericks, his undivided one-half of the said mill and premises, and that he, the said Fredericks, has held and occupied the same, under such lease and agreement, from the date aforesaid until about the 6th day of March, A. D. 1875; and the said defendant avers and charges, for a further defense to the said action, as well as for cross-complaint or bill therein, that the said
142 mill was constructed and erected, and the materials therefor, together with the appurtenances, with the means of the said W. A. Fredericks and this defendant; that the said plaintiff in this action had no estate, real or personal, in her own right or otherwise, and was then and still is the wife of the said W. A. Fredericks, and did not contribute any sum whatever towards the erection or completion of said mill and premises, and that the said W. A. Fredericks was, at the time of the erection and completion of said mill and premises, and ever since has been, and now is, the owner of the same. And this defendant, further answering, avers that at the time of the erection of said mill, and the acquiring of the title of the same and the premises connected therewith, the said W. A. Fredericks was, ever since has been, and now is justly

indebted unto this defendant and divers and sundry other persons in large sums of money; that for the purpose of securing the debt and demands of this defendant he commenced his suit in the district court within and for the said county of Gallatin, in the Territory aforesaid, against the said W. A. Fredericks, on the 6th day of March, A. D. 1875, and at the same time caused a writ of attachment to be issued from under the hand and seal of the clerk of said court, which said writ was duly served on the said undivided one-half of said mill, fixtures, and
143 appurtenances, as the property of the said W. A. Fredericks. A copy of the amended complaint in said cause and writ of attachment is herewith filed, and made part of this answer as Exhibit A & B. That the same is still in full force and effect, and by virtue of said seizure and levy of said writ the said defendant acquired and became, and now has, a lien, on the said mill and premises aforesaid to the extent of his said demand; that the said W. A. Fredericks, being so indebted as aforesaid, and for the purpose of hindering, delaying, and defrauding defendant and said other creditors out of their just debts and demands as aforesaid, caused a conveyance to be made to the said plaintiff of the said undivided one-half of said mill, premises, and property described in her said complaint, and whatever pretended interest or estate she acquired by virtue of said conveyance had only the effect of vesting in her the naked legal title to said undivided one-half of said mill in trust for the sole and exclusive use of her said husband, the said W. A. Fredericks. And this defendant, further answering, avers the facts to be that the said mortgage executed to the said Caleb Gilbert is and was a part and parcel of the same fraudulent design, combination, and confederacy of the said plaintiff and the said W. A. Fredericks, her said husband, to cover up and place beyond the reach of the creditors of the said W. A. Fredericks the said property men-
144 tioned therein; that the said W. A. Fredericks, at the date of said pretended conveyance, was, ever since has been, and now is wholly insolvent; that the said W. A. Fredericks has remained in the sole and exclusive possession of said mill and premises since the day of November, A. D. 1873, and has ever since enjoyed the use, benefits, and profits arising from the same. And defendant further avers that the said W. A. Fredericks so held and retained the interest of the said defendant in the said mill and premises, as such lessee, until the 6th day of March, A. D. 1875, when the said lease therefor ceased and determined; and that on or about the day last above named this defendant demanded of the said W. A. Fredericks, who was then in the possession of his undivided one-half of the said mill and premises, and into the possession jointly with the said W. A. Fredericks of the said premises, as a tenant in common of the said W. A. Fredericks, but that the said W. A. Fredericks then and there refused to admit this defendant into the joint possession with him of the said mill and premises, or any part thereof, and refused to allow or admit the defendant into the possession of the same, or any use or enjoyment of the same, or the profits or proceeds thereof, but wholly excludes this defendant from such possession; that the said mill is a flouring-mill, and is very valuable for the purposes of grinding grain and producing flour; that there is now
145 and has been since the said date of the exclusion of this defendant from the said mill an abundance of grain to be ground at said mill; and the use of the same is very valuable.

Wherefore defendant prays that the said W. A. Fredericks be made a party to this suit; that he be required to answer this cross-complaint, and this honorable court may, by its judgment and decree, declare all

pretended deeds and conveyances to the said plaintiff in and to said mill and premises null and void, as against this defendant and all other creditors of said W. A. Fredericks; that the said pretended mortgage to the said Gilbert, and all liens acquired thereunder, be postponed to the demands, liens, and incumbrances of this defendant; that an accounting of all the proceeds and profits of said mill be had, and that the said plaintiff and her said husband be adjudged to pay defendant all such sums of money as may be found due defendant on the taking of such account. And inasmuch as said mill and premises and property aforesaid cannot be divided in kind without injury to the parties and creditors interested therein, defendant prays that the same may be sold in manner and form as prescribed by law, and that the proceeds of said sale be brought into court to await the order of distribution
146 thereof, and for such other and further relief as shall be agreeable to equity.

(Signed) WORD, SPRATT,
CHUMASERO & CHADWICK,
WOOLFOLK, &c.,
Att'ys for Defendant Davis.

TERRITORY OF MONTANA,
County of Gallatin, ss:

Andrew J. Davis, being duly sworn, says he has heard the foregoing amended answer read, and knows the contents thereof; that the matters therein stated of his own knowledge are true, and that the matters therein set forth on information and belief he believes to be true, and that he is one of the above-named defendants.

(Signed) ANDREW J. DAVIS.

Subscribed and sworn to before me, this 14th day of May, A.D. 1877.
THEO. MUFFLY, *Clerk.*

EXHIBIT A.

In the district court of the first judicial district, county of Gallatin, Montana Territory.

ANDREW J. DAVIS, PLAINTIFF,
vs.
WELLINGTON A. FREDERICKS, DEFENDANT.

And now comes the above-named plaintiff, by leave of the
147 court first had and obtained, and complaining of the above-named defendant avers that heretofore, to wit, on the 14th day of November, A. D. 1873, at the county of Gallatin, in the Territory of Montana, the said plaintiff was the owner and in the actual possession of an undivided one-half of a certain flouring and grist mill situate on what is known as Willow Creek, in the said county of Gallatin; that on the day aforesaid the said plaintiff and the said defendant entered into a contract in writing whereby the said plaintiff leased to the said defendant the said undivided one-half of said mill and the appurtenances for the term of one year from the aforesaid date, which written contract was duly executed by the said plaintiff and the said defendant; that by the terms of the said contract the said defendant, in consideration of the covenants and agreements on the part of the said plaintiff contained in the said contract or lease, undertook and agreed to pay and deliver to the said plaintiff one-fourth of the gross earnings receipts of the

said mill and premises, including wheat, bran, screenings, and all kinds and descriptions of produce usually received and ground at flouring and grist mills; that under the said contract or lease the said defendant entered in and took possession of the said plaintiff's one-half of said
148 mill on the day aforesaid, and all the appurtenances connected therewith, and has used, occupied, and possessed the same from said 14th day of November, A. D. 1873, until the date of the commencement of this action, the said defendant holding over and retaining the possession thereof under the stipulations, provisions, and agreements of the aforesaid contract and lease; that the gross earnings of said mill and premises during the time aforesaid are and have been grain, flour, bran, shorts, and screenings of the value of ten thousand dollars, and that one-fourth of the said gross earnings of said mill are and have been of the value of two thousand five hundred dollars, and the same are now due, unpaid, and undelivered to this plaintiff; that the said plaintiff heretofore, to wit, on the 5th day of March, A. D. 1875, at the said county of Gallatin, demanded from the said defendant the payment and delivery to him of the said one-fourth of the gross earnings of said mill, as aforesaid, under the said contract due and deliverable to him, the said plaintiff, but to pay or deliver the same or any part thereof the said defendant hath hitherto failed and refused, and still doth fail and refuse; and the said plaintiff, further complaining, for a separate cause of action alleges that on the 10th day of October, A. D. 1867, at Gallatin City, in the said county of Gallatin and Territory of Mon-
149 tana, the said defendant made his certain promissory note or contract, in writing, bearing date on that day, which said note or contract in writing is in the words and figures following, to wit:

"GALLATIN CITY, *Oct. 10th*, 1867.

"For value received, I promise to pay A. J. Davis, or order, twelve hundred dollars, in flour, at the Helena prices per quantity, less the freight from this place to Helena, to be delivered on or before the first day of June next. This contract is upon a gold basis.

Signed "W. A. FREDERICKS."

[Int. rev. stamp, 50 cts.]

And then and there delivered the said promissory note or contract to the said plaintiff, who is now the owner and holder thereof; that the said defendant failed and refused to deliver the said flour, or any part thereof, to the said plaintiff, at the time the same was to be delivered under the said instrument in writing above set forth, or at any other time, and failed to pay the said plaintiff the said sum of twelve hundred dollars, or any part thereof, although both said flour and said sum of money were demanded at the time the same was delivered and payable under the said promissory note or contract; that by reason of the failure of the said defendant to deliver the said flour as pro-
150 vided in the said instrument in writing, this plaintiff has been damaged in the sum of $1,200.00, together with interest on the said amount from the 1st day of June, A. D. 1868. And the said plaintiff, further complaining of the said defendant, for a separate and further cause of action states, that the said defendant, at the time of the commencement of this action, was indebted unto him on open account in the sum of four thousand six hundred dollars, the same being for divers and sundry sums of money loaned to the said defendant, at his special instance and request, between the 10th day of October, A. D. 1867, and the 1st day of February, 1874, and for money paid, laid out and expended for the said defendant, at his special instance and re-

quest, by this plaintiff, between the days aforesaid, and for lumber, blacksmith tools, and goods, wares, and merchandise sold and delivered to the said defendant, at his special instance and request, between the dates last aforesaid; that no part of the said sum of $4,600.00 has been paid by the said defendant although often demanded. Therefore, the said plaintiff demands judgment against the said defendant for the sum of $2,500.00, with interest thereon from the 6th day of March, A. D. 1875; and also for the sum of $1,200.00, with interest due thereon from the 1st day of June, A. D. 1868, and also for the sum of
151 4,600.00, with interest thereon from the 1st day of February, A. D. 1874, besides costs of suit.

(Signed) SAMUEL WORD,
THOMAS R. EDWARDS,
CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Andrew J. Davis, being first duly sworn, deposes and says that he is the plaintiff named in the foregoing amended complaint; that he has heard the same read, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, he believes it to be true.

(Signed) A. J. DAVIS.

Subscribed and sworn to before me, this 1st day of April, A. D. 1876.

[L. S.] W. F. CHADWICK,
Notary Public.

(Endorsed:) No. 2. Andrew J. Davis vs. W. A. Fredericks, amended complaint. Filed Ap'l 5, 1876. W. F. Davis, clerk.

A true copy. Attest my hand and the seal of said court hereto affixed, this 14th day of May, A. D. 1877.

[L. S.] THEO. MUFFLY, *Clerk.*

EXHIBIT B.

In the district court of the first judicial district of the Territory of Montana, in & for the county of Gallatin.

152

Writ of attachment.

A. J. DAVIS PLAINTIFF,
vs.
W. A. FREDERICKS DEFENDANT.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above-entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, by the plaintiff in the said action to recover from the defendant, W. A. Fredericks, in the said action the sum of $2,500.00 *dollars*, lawful money of the United States, besides interest

157 MONTANA TERRITORY,
Gallatin County:

Wellington A. Fredericks, being duly sworn, says he is the answering defendant in the above-entitled cause, and that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

(Signed) WELLINGTON A. FREDERICKS.

Subscribed and sworn to before me, this 14th day of May, A. D. 1877.

J. H. SHOBER,
Notary Public, M. T.

Answer of Caleb Gilbert.

In first judicial district court, Gallatin County, M. T.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS ET AL., DEFENDANTS.

Now comes the defendant Caleb Gilbert, and for answer to plaintiff's complaint and the amended answer and cross-complaint of defendant, Andrew J. Davis:

1st. Admits the facts averred in plaintiff's complaint so far as the incumbrance and mortgage referred to in said complaint is concerned, held and owned by this defendant.

2. Denies all fraud alleged in Andrew J. Davis' amended an-
158 swer and cross-complaint, and denies any collusion with any one in relation to said mortgage.

3. This defendant avers that said mortgage referred to in said complaint is a bona fide existing lien in favor of this defendant, and that said mortgage is a prior lien and incumbrance on the property described in said mortgage and complaint to any lien of said Andrew J. Davis.

Wherefore this defendant prays that he be decreed by this court said lien, and such other and further relief as to this court may deem just and equitable.

JOHNSTON & TOOLE, &
J. H. SHOBER,
Att'ys for Def't Gilbert.

TERRITORY OF MONTANA,
County of Gallatin, ss:

John H. Shober, being duly sworn, says he is attorney for the defendant Caleb Gilbert in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true *of* to the best knowledge, information, and belief of this affiant; that the reason why this verification is made by this affiant is that said defendant does not live in the Territory of Montana, but is a resident of and now resides in the State of Illinois.

(Signed) J. H. SHOBER.

Subscribed and sworn to before me, this 15th day of May, A. D. 1877.

(Signed) THEO. MUFFLY, *Clerk.*

159 GALLATIN CITY, *May* 8, A. D. 1872.

Mr. A. J. DAVIS:

D'R SIR: I have made up my mind to build the mill on Willow Creek. I want you to fetch bolting cloth for 2 reels, 20 feet long, 36 in. diame-

ter, 6 p'ibes; it wants No. 10 and 11 for the first reel, No. 9 and 10 for the other. I think you have No. 9 enough for ½ of one reel, and fetch one oats-separater and one smut-mill. I think the California smut-mill is the best; you had better get No. 2 machine. I will want 1 run of mill-stones. I would rather have 3½ feet stone, but if you are going to fetch out your old mill-burs one of them will answer. I would like to know the length of the spindle, as I can fetch a proof-staff and some mill-picks; the balance we can get up here. I will want a lot of 4 in. leather belting. No news of importance. Sarah and the baby is well and send respects. Please write soon.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *September* 28, 1872.

A. J. DAVIS:

DEAR SIR: I have been home all of this week a rigging up the 4-horse team; will start up to the mill Wednesday or Thursday next; ex-
160 pect to come back by Sunday next with a load of flour for the house. I think I can fetch enough at one load to lay the lower floors, so if I can get harness I will have the lumber down next Sunday; if you have a harness that you can spare I wish you would send it out. Mr. Galen has some harness here for sale. I was in hopes you could come down this last week. I want to see you in regard to the mill. Drew don't want to go on with his interest, and said that he would buy my interest in the saw-mill if I would take my pay in lumber. I have got the mill all framed and waiting for teams to move it; but everybody is so busy in stacking their grain that I have been unable to get any of it hauled yet, but I may get some teams soon. Money matters have been so close that Drew has not been able to send you as much as he expected; he wanted to know if you would wait on him until he could collect, if not he would have to hire it. J. S. Willson is waiting to see you in regard to the old mill case; he has failed with his settlement with Thomas. I will expect you up soon.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *October* 16.

A. J. DAVIS:

D'R SIR: I have just returned from the mill with a load of lum-
161 ber for Willow Creek. Drew says that he has not done as well as he expected, and money is so scarce that it is impossible for him to go on with the grist-mill and wants me to take it off his hands, and I don't see how I can put it up this winter alone; what do you think is best to do with it; if you say stop until spring, all right, or if you say go on, I will do all—with it, or you want Drew's interest can have it. The frame is all ready to raise and the tubs are all ready, and about all of the lumber is out ready to move. I have got flooring enough here to lay all of the bottom floors in this house, and *lnop* boards, and if I had the glass and putty and door hangings I would get it inclosed. Judge Murphy wants to rent the old house. Answer soon. I will be home next Sunday again.

Yours,

W. A. FREDERICKS.

GALLATIN CITY, *October* 21, 1872.

A. J. DAVIS:

D'R SIR: Yours of the 18th is at hand. I would say in answer that I feel determined to go ahead with the mill as fast as I can. It has got to go up. Drew says if he haden't to pay you that thousand dollars that he could go on with it, but it is a going to crowd him very much to pay you. He said that he was willing to go on with the miil as fast as he can after he pays you, and if I wait for that it will be next year before he will get around. If I had about one thousand dollars I
162 think I could get it about ready to start. I am getting it down as fast as I can. I have got all the lumber here for the house, and will set it up on the land soon. The time is out on the land, and it can be entered as soon as I can get the house up. As for Drew, I don't feel like waiting on him any longer if theres is any other way to go on. He is willing that I shall take the lumber and timber that is got out for the mill, and he will take as much more. I expect I could get another party to take Drew's interest, but I don't want any more partners. The farmers say they will hold as much of their wheat as they can, and if it ain't a going on this winter we will loose all of this crop. Drew has offered me 75 thousand feet of lumber for my interest in the saw-mill. If I get a chance to sell Corley & Billy, and lame Billy, harness, and wagon, and take it in hauling lumber, is it best or not? I shall start for the mill in the morning. If it was not for this grist-mill I would come up and help you this winter. If I can make a bargain with Drew for the saw-mill I believe I will let it go.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Dec.* 11, 1872.

163 A. J. DAVIS:

D'R SIR: I have been upon Willow to-day. Seen a number of the men. They say if I will go ahead with the mill this winter they will turon out and dig the mill pit and race and the dam free of charge. I have not given them any answer yet. What do you think about it? Are the mill-stones and smut-mill come yet? I will go to Bozeman tomorrow for a load of lumber. Will be home Saturday. Would like to hear from you when I come back. I think I can get two or three carpenters and pay them in lumber. The worst would be is in raising grub. I think I can start it in two months after the foundation is laid. If it is put up it will get all of the wheat, Upper and Lower Willow. They are down on Thomas; he abous seas to do anything to start the mill. Let me know what you think about it.

Yours, truly,

W. A. FREDERICKS.

GALLATIN, *October* 28th, 1872.

A. J. DAVIS:

DEAR SIR: I received your letter yesterday. I shall start at once for Bozeman for a load of lumber and then return to Willow Creek; then to Stirling and get a load of your iron. I will be back here from Stirling about next Saturday. I am very buisy in getting the
164 timber down for the mill, but it is getting so late I am afraid it won't get it up this winter. I will come up next week with your load if nothing happens, and then we will talk the matter over and see what is best to do about matters in general. Do you want that band iron in the shop? May be you had better write and tell me what you

will need the most. I don't know how I shall manage about money for expenses. I never saw such times to raise money, and I am strapped.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *September* 2, 1872.

Mr. DAVIS:

D'R SIR: I have received 2 letters from you since I went up to the mill. I come down home yesterday to see you here. I want to make some more inquiries about that water-wheel. Has it got an iron case around the wheel similar to the lefel-wheel with the gates in it, or has it got to be put in a wooden scrale? I want to frame the deeken to hold the wheel this week. I am somewhat lost to know the power and the speed of that wheel. I have nothing to go by but lefel book, and I don't think it has the same speed nor power as the lefel-wheel.

165 If you can find out anything different from lefel calculations let me know, as I want to get my other gearing up as soon as possible. Give me the size of your flang'-gudgeon for belt-shaft and conveyor-shaft. I think you have a pattern that will take a 6½ inch wood-witch will be about right. I would like to know the size of your bevel-wheels patterns, and I may arrange the machine to suit the patterns. I shall get ready to move down on Willow Creek in 15 days. I want to raise all the teams next week I can. I would like to use Billy & Coley and the *am*, if you don't need them. Have you got any patterns for a *ve* friction wheel, about 2 feet diameter? I am sorry Mr. Drew has failed to get you that money as soon as he told you. They had some bad luck and broke the big band-wheel, which has been a great drawback. He is going to make a draw on government to-day for you. Please answer to Bozeman.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Dec. 22d*, 1872.

A. J. DAVIS:

D'R SIR: I have received 2 letters from you of late. I have just returned home; the weather is very cold and stormy here. I have got all of my lumber away from the mill that is sawed out, and W.

166 Wright has agreed to haul that as soon as it is cut out. I have about 5,000 feet at Foster's to be dressed, but he is froze up, and I don't know whether I will get that or not. I have 4 loads here to take over on Willow Creek. The weather is very cold, and if it continues cold I don't think it is best to do anything towards building the mill this winter. I don't think that the parties on Willow will bind themselves to do anything, and if they don't I shan't do anything this winter. I will know more about it when I go up on Willow again. I don't think Drew intends to have anything to do with the mill than he can help. I have not said anything to him of late about the matter. I have got 35,000 feet of lumber on the way and there for the mill, and there is about 6,000 feet more to come. I have not had time to go and see the man that is owing you, but will see them soon if the weather is not too stormy. I think I can get ready to come over in about two or three weeks from now. If the weather is cold you can't finish your house. It won't make any difference with us; you can use your old office.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *July* 8, 1873.

A. J. DAVIS:

167 SIR: I received your letter dated the 2nd. I got those notices and have put them up. I have just come back from the saw-mill. Everything is going on very well there, except there is no money to buy lumber. Drew says it is impossible to sell lumber and get money. He says that he is sure that he will get a bill of government; he is going to send me 2 mechanics in a few days. I have got 4 teams to start next Monday after lumber; in 3 weeks I will have all my lumber down. I have got the mill raised, and I think half of the dam is in. Drew says the same as about the mill as he did last winter; he don't want any interest in the grist-mill, but will help me all that is in his power. I want you to send from Clark and Conrad & Curtin 1 keg of 10 nails, 50 lbs. 5 in. spikes, 30 lbs. No. 6 nails, 20 lbs. No. 4 nails, 1 gross of 1½ in. wood-screws, one gross 2 in. screws; send 5 gallons syrup; there will be a team call at Conrad's for it next Friday. You can get all of the bolt-green ready, and the 3 upper lengths of the upright shafting, and leave the lower length until the water-wheel comes. You can get the spindle and step and stones ready, and send all of the gudgeons for the conveyors and bolt shafts soon, as I shall need them, (the gudgeons) in 3 or 4 weeks. I think I shall make
168 some changes in the shafting in the lower story of the mill, but can't do it until I get the water-wheel down, and that I don't expect for 2 weeks yet.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *September* 22, 1873.

A. J. DAVIS:

SIR: I received yours of the 8th to-day. You didn't say anything about shipping any of that machinery. I am ready to use it all, and I want you to ship it as soon as possible. I have got 5 men at work and can't work but a few days longer without the balance of the machinery. I expect to get it ready to run the *the* last of October. Do you want Mood to start the mill if he can be got? John Emmerson is here and can be got. I wrote you some 2 weeks ago about the elevators' belts; they should be 4¼ in. wide or 5 in. to use those elevator-cups; and I can't put up my elevator's spouts until I know the width of the belt. I sent Mr. Timan the affidavit some time since; write by return mail. If I can raise the money I would like to come in and have the land entered.

WILLOW CREEK, *Sept.* 7, 1873.

A. J. DAVIS:

SIR: I will give you the bill of belting—250 feet, 5 inches wide,
169 leather, or 4¼ inches would do—this bill is for elevators. Please let me know which you will send; let me know soon. 46 feet 3 in., 12 in. wide; this is the stone-belt; if you have a No. 1, leather belt you can send it, if not send gum, 36 ft. 6 in., 10 in. wide; this drives the upright line shafting; this will do as well to be leather or gum; 14 ft. 10 in. wide, leather; 18 ft. 6 in. wide, leather; 60 ft. 4 in. wide, leather; ½ side string leather; 2 gro. copper rivits, ⅜ in. long; 1 gross 2½ in. wood screws; 2 doz. wood-screw bolts, ⅜ di., 4 in. long; 1 dozen do. ½ in. diameter, 6 in. long. You may send all the machinery as soon as you can; the mill is inclosed and half of the floors are laid,

and a part of the band-wheels is made. I shall have the water-wheel in this week; I have 2 men now, will have 2 more next Tuesday, and shall need everything that belongs to the machinery soon. Send 110 elevator-cups.

W. A. FREDERICKS.

Please tell Clark Conrad to send me 50 lbs. 10-pen. nails and 50 lbs. 8-pen. nails; send it with one of the first teams that you send out with machinery; don't forget to send that piece of galvanized iron to make the stones curb, 14 ft. long, 3 in. wider than the eye of the stone is deep.

WILLer CREEK, *Oct.* 26, 1873.

170 A. J. DAVIS:

SIR: I received your letter to-day; you said nothing about them shafts and the bolt clothing that was on the bill of the last load and 2 didn't come here. Dunphy has paid the men on your letter, and they have gone to Corrinne. I written them a letter at Bozeman, supposing they would come back for the receipt; it is possible that you didn't send the bolt-cloth that was not made the 2 shafts; I don't miss it much, must be a mistake in making out the bill; if you haven't sent the bolt-cloth I wish you would, so I can make it up; in examining the roll of creenry I see you haven't sent any coarse screaning for the tail end of the reel; you will have to send another piece 12 feet long, 16 in. wide. I wish you would send the big belt for the stone. I may have to grind the bars down with sand, and will not do it until I get the belt. Send a piece of string leather. I can't get it here. You didn't say anything about a mill 'cales; do you expect to furnish them, or how are they to be got; and the mill has got to have a stone and pipe, which I expect the mill will have to get. I have got an answer from Mood; he was to come down to day, but didn't come; I don't expect I can make a bargain with him; he will want 6 or 7 dollars a day and that is more than the mill can earn the way flour is selling;

171 I can get Emmerson for about one-half that Mood will come for; the farmers in general think Emmerson is as good a miller as Mood, and he wants two-thirds of the toll, and I expect Mood will want all, and that won't do; give me your opinion on the two men. I think if Mood don't come down this week, I will let Emmerson go to work on the burs; in regard to your interest, I will think of it and see what I can do. I want to ask you a question: if I settled up my matters with Drew and get the other half of this mill, will you consent to the trade? Now I have done all that has been done here this summer, and if I hadn't of done the way I have there would have been nothing done. I have worked very hard to get the mill agoing, and have had no help from anybody only the men that Drew sent down, and I expect to pay them, and if you will consent to exchange Drew for me I think I can make the exchange. I don't want any trouble on this mill, and I hope it will be all straightened up without any fuss.

W. A. FREDERICKS.

BOZEMAN, *March the* 28*th*, 1874.

Mr. A. J. DAVIS:

DEAR SIR: I received a letter from you some ten days ago, and you say you had not been over to Willow Creek yet; and did not say whether the mill was finished or not. I would like to know if

172 Fredericks can hold me responsible for his debts that he owes on the mill, as his wife agreed to pay all of them; if they can I can make myself safe on some of it. I would like to know what to do. I look to you for advice, for I don't want to pay any more debts of the mill, for I will have all I can do to pay your debt this season. Fred's wife wants me to give her another deed from what I have given. I don't know what it is yet. I will let you know what it is, or will it do to take Edwards' advice on it. If you say that Edwards will do, I will let it go at that; have you and Fredericks had any trouble about the mill. I haven't heard of any, but I thought so by her wanting another deed. I wish you would keep me posted as well as you can, so as I won't get into any trouble. I am cutting logs now so as to have them ready as soon as the water comes, and I am not contracting anything only to pay it in lumber, so as I can have all the avails of lumber to pay you. I will write you again as soon as I find out what Mrs. Fredericks wants, and I would like to have you let me know what to do as soon as you get my letter. I am at the mill the most of the time and don't get a chance to come down only once a week.

Yours, truly,

W. H. DREW.

173 MIDDLE CREEK, *Jun.* 17, 1873.

Mr. A. J. DAVIS:

DEAR SIR: I wrote you some time ago that I would send you some money the first of this month, which was impossible to do. I have been compelled to be at the mill for the last three weeks; the water has been so high it took away my boom, and I lost some 3 or 4 hundred logs, and I had to go below the mill and make another and run in what logs I had banked; then I got another boom ready above the mill, and then went down so that I got it in and run in a lot of logs; it dam'ed the creek up so that it run all over around the mill, and I had to watch it night and day; and the creek is falling to-day, and it takes me several days to turn the water out of the road, and put one span on my bridge; the mill ha'in't run any for three weeks, on the account of high water; the creek raised two feet higher this spring than last year. I will have as many logs as I can saw this summer, and it won't cost me more than eight dollars to get the lumber delivered in the yard; and I don't have to pay any money only as lumber is sold for the cash, for any work done. I got a letter from the post to-day to know what I will furnish all the lumber, laths, and shingles that they may want this summer. I

174 will see them in a few days; as for the grist-mill, I will send as many men as Fredericks says he can use to advantage as soon as the water goes down, so as they can work to advantage. I am as anxious to get the mill started as you are, and am ready to furnish hands or material that is needed; for that matter, I have looked to Fredericks to see to, and stand ready to fill his orders at any time, but it is necessary for me to attend to see the saw mill in order to be able to pay expenses between us both. I hope we will be able to get the mill running as soon as you could expect it. I see by your letter that you think that I do not appreciate your extended favors, which you are very much mistaken. It is my opinion that from the first start that you wanted to help Fredericks and myself get a little start through your kindness. I am satisfied we will have all completed that we have undertaken by the fifteenth of September next. I am very sorry that I have not been able to have paid that note. I know it is right and just that it should have been paid long ago, and I assure you that I am very much obliged to

you for waiting on me; but I think I will soon be able to settle it up; it has made a great difference with me on the account of the fort not using any lumber; the old buildings have all been condemned and they
175 expect to commence the first of July to build new quarters; if they do, it will require a good deal of lumber, and I am prepared to turn out three thousand feet of lumber a day for three months. I am in hopes that I will be able to straighten up things in a short time to your satisfaction.

Yours, truly,

W. H. DREW.

BOZEMAN, *May* 1, 1874.

Mr. A. J. DAVIS:

DEAR SIR: I have just received your letter stating you had been to Willow Creek, but did not find things all right. I wrote to Fred. some time ago about the dam; if it was done, and he wrote me he would have it done by the tenth of May, so as to be sure of high water; as for the balance of the mill, I supposed it was finished. I will write to him and see what he says about it. I am sorry that you did not find your toll all right. I hope there won't be any trouble until you accept of the mill from me. I don't want the woman to make mischief between us. I wrote to Wright about those cattle some ten days ago, but ha'*in*'t got any answer yet. I sent my boy over to see him this week, but he ha'*in*'t come back yet. I have paid Edwards fifteen dollars, and told him I would pay him the balance as soon as I could possibly get it all;
176 he said he would like it as soon as he could get it. How would you like to trade that note of mine for Fred.'s interest in the mill or their homestead. I don't know but I could make a trade. I could find out if it would suit you. You speak of some material being furnished. I would like to have you send me your bill of anything you have furnished, that you have against me, so as I may know what to do with Fred., as I settled up all other matters except with you, when I was there; the weather has been so bad and men so scarce I ha'*in*'t started sawing yet. I would like it if you could make a trade for the mill, as it would then avoid all trouble; as for that woman, you know what she is better than I do; as for Fred., he works hard, and if he was in business by himself it would be better. I will write as soon as I hear from Fred.

W. H. DREW.

HAMILTON, *Aug. the* 20, 1874.

Mr. A. J. DAVIS:

D'R SIR: I' has been a long time since I wrote to you; money is so hard to get that I ha'*in*'t been able to sell anything to get much to send you. I sold ten head of calves to Grannis and he was to send you the money, and I sold one to-day, and I will send the money when I go to Bozeman. I have quit the mill to cut my grain. I will have
177 enough for bread & seed. It will take about ten days, if it don't rain too much. I have been in hopes that the Jefferson mines would make a market for lumber, but it ha'*in*'t yet, and I don't see anything that will turn into money this fall. I have not seen Fredericks since you wrote me, but I heard he had the dam up and was running. I wrote to him to give every man a receipt for every load of grain that was brought in the mill, so as it would agree with the books at the mill. I will go over and see how he is getting along before I go up to the mill again and will

let you know. Now I would like to know what you will do with my mortgage; if you will give me more time, and how long; how much lumber will you take delivered in Bozeman this fall and next spring; how much wheat delivered at the Willow Creek mill next fall and a year from next fall; if you can give me until next fall I want to rent out a part of the ranch to put into wheat, and I would like to know right off, or if you don't, and I can rent it out and let the rent go to who ever own' the ranch when the grain comes off. I wish you would write soon, so as I can get to know what I am to do before I go over to the mill; and if there is any thing you want I should do about the mill on Wil-
178 low Creek let me know. Has Fred. paid any of the indebtedness upon the mill this summer?

Yours, truly,

W. H. DREW.

BOZEMAN, *May the* 30, 1874.

Mr. A. J. DAVIS:

DEAR SIR: I received two letters from you to day stating that you did not feel willing to accom'odate me with that amount of money that I asked for, on account of the security that you had would not warrant it; it is all right; and, further, you will see that I will try to do what is right. Grannis has not come back yet. The man I let have the beef cattle, he was to *of* been back the 20th of this month. I did not see him; my son sold them to him on the Yellowstone. I told him to sell them at the Mission, but he was one day too late. I found six cows after I gave the mortgage, and I sold four of them to Grannis for my own use; all the balance are here except one steer that strayed, but will try and find him. Grannis said to my son that when he came back he wanted to buy all of my cows, and I will try and sell him all of the cattle; if so, I think I can raise 1,000 dollars. I see that you thought that Edwards was not looking after matters, but I told him how it was, and he see that I had not molested any of the stock I had turned out.
179 As for that deed of Mrs. Fredericks, I *I* may have done wrong, but you knew how the first deed was, and the last deed was worded the same as the first. I asked the recorder to write you a statement to let you know if there was any difference, and he said he would. You have said that Mrs. Fredericks said that I talked against you, and did not think I would do what I had agreed to if I could help it; if Fred. and his wife will do what is right, as near as I do, I will guarantee that there never will be any trouble. You had ought to know what she is by this time, and take her word for what it is worth. I hope this will be satisfactory to you, and that you will feel satisfied that I am not trying to do anything wrong in our matter of deal. As soon as Grannis comes back you will hear from me again.

Yours, truly,

W. H. DREW.

BOZEMAN, *May the* 21, 1873.

Mr. A. J. DAVIS:

SIR: I received your letter a few days ago, and I have neglected answering it on the account of my family being sick. I have had to be with them the most of the time for three weeks. My wife and myself has had to set up with them all the time, and they are not much better yet. I was very glad you answered that matter of Mr. Perkins,
180 for I could not get anything out of him, for he said he could

make a turn with you. I don't think I can send you any money before the first of June. I am anxious to pay the balance of that note. I received a letter from Mr. Fredericks last week that he was at work at the mill. I see you are anxious to have it up. I believe that I have done everything that has been required of me. I have furnished what lumber he called for and paid for hauling and paid for carpenters to frame it, and the last letter I got from Mr. Fredericks at Helena was that he would not do anything more until July, as he did not think he could get a title to the land before then, and he would not do anything until he did. There is but very little doing here; just about enough to pay expenses. There is some talk of commencing work at the post soon, and then times will liven up a little. I have managed to pay my way this winter, so as to be ready to put up that mill as soon as it could be, for it has cost me a great deal and I don't want to be out of the money any longer than I can help. What did that wheel cost?

Yours, truly,

W. H. DREW.

TERRITORY OF MONTANA,
County of Gallatin, ss:

181 I, Theo. Muffly, clerk of the first judicial district court of Montana Territory, in and for the county of Gallatin, hereby certify that the foregoing, on pages from 1 to 57 inclusive, contains a full, true, and correct copy of the pleadings and letters of defendant Davis made and had in the case of Sarah J. Fredericks, plaintiff, against Andrew J. Davis and Caleb Gilbert, defendants, and that the same is a supplement to the original transcript in said case and now on file in the clerk's office of the supreme court of Montana Territory.

In witness of which I have hereunto set my hand and affixed the seal of said court, *of* my office in Bozeman City, M. T., this 27 day of December, A. D. 1877.

[SEAL DIST. CT.]

THEO. MUFFLY, *Clerk*,
By AMIE J. MALIN,
Deputy Clerk.

And afterwards, to wit, on the 10th day of January, A. D. 1878, this cause came on to be heard upon defendant's suggestion of a further diminution of the record herein, whereupon the court made the following order upon said suggestion, to wit:

Order to correct record.

SARAH J. FREDERICKS, PLAINTIFF AND RESPONDENT,
vs.
ANDREW J. DAVIS, DEFEND. & APPELLANT.

182 It appearing to the satisfaction of the court that the following letters and documents were introduced in evidence by respondent and included in the bill of exceptions on motion for a new trial in said cause, to wit:

Letter dated Dec. 19, 1874, of Davis to Drew.
" " May 13, 1872, " " " plaintiff.
" " " 4, 1873, " " " Drew.
" " Jan'y 27, 1875, " " " plaintiff.

Also two bills of lading, Sept. 30, 1873; also the contract between

plaintiff and Drew; also the letter, dated Oct. 1, 1872, or 1873, of Davis to W. A. Fredericks. And it further appearing that no copies of any of said documents or letters (except the contract between Davis and Drew) are embodied in the transcript herein, it is therefore ordered that the clerk of said district court of Gallatin County furnish copies of said letters and documents to this court on or before the 17th day of January, A. D. 1878, in record form.

And afterwards, to wit, on the 21st day of January, A. D. 1878, in obedience to the order of this court, so as aforesaid made and entered, transmitted in transcript form, and as a supplement to the transcripts of record heretofore filed in said cause in this court, which said supplement is in the words and figures following, to wit:

183 *Supplemental transcript.*

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT,
defendants.

Letters introduced in evidence by plaintiff.

HELENA, *December* 19, 1874.

W. H. DREW:

On my return found letter from you, stating you had forgotten the very thing you came all the way over here to ascertain, and inquire again what you could depend upon the coming season. When you left here you were to go home and gather up the remaining cattle, sell them and pay as far as they will go on the note. You were to go on and manage the farm and mill as best you could; that you were to have the balance of my logs sawed up and stacked up with my lumber at the mill. It matters not to me whether you rent the farm and mill or not; all is, I want you to pay as fast as you can, and, as long as I am satisfied that you are acting in good faith, I do not propose to distress you. All these facts I stated to you when here, and also gave you the balance due on your note. At that time I stated to you, when here, that I did not wish to sell the interest in my mill at Willow Creek, and I now state to you that I have no particular business for you at Willow
184 Creek. I am seeing that the dam is completed as per our contract, together with what the contract requires. You are so very forgetful, I fear that you would be an unsafe man to entrust business with. Indeed, sir, I should fear that you would recollect more than was said to you. For these reasons I shall decline to call upon you to attend to any business for me. I shall soon put a man at Willow Creek to look after my interest at that place.

Yours, truly,
(Signed) A. J. DAVIS.

HELENA, MONTANA, *March* 13, 1872.

DEAR FREDERICKS:

Yours of the 11th instant I have just received, and hasten to reply. In regard to the drag-teeth you can sell them to Millen, as he proposed. I want to close out all of those traps, and do not let a reasonable offer in cash slip for plows, drag-teeth, or old wagons, &c. Our friend

Thomas, as I told you when I last saw you, made an effort to enter that forty upon which the mill stands before the land-office at this place, and was refused. He took the case to Washington, and they have just informed him that there is no law whereby he can enter that land. Thus, you see, he is barred in the land office. I probably will be out the last of next week or the early part of the week following. I am glad
185 to learn that Sarah is getting along so well; having made my home so long at your house, she seems more like a relative than a friend, and I shall always feel a lively interest in her welfare. Indeed, she has always taken as deep an interest in all that was mine, and especially in everything that contributed to my comfort, as any sister could; and I shall always feel indebted to her for such attention and trust that I may have an opportunity to reciprocate. My best regards to her, and kiss the baby for me. Have you named him yet? She had better name him after her father, which is her choice.

Yours, truly,

A. J. DAVIS.

HELENA, *May 4th*, 1873.

W. H. DREW:

D'R SIR: It is now past the first of May and the balance on that note is not paid. I am very much in need of money, and hope you will remit the balance or at least a part of it on the receipt of this note. Frederick started over to Gallatin last week; probably he is at your place before this; he took over the pinion to your saw-mill. Mr. Perkins wrote me some time since desiring to sell me his interest in the judgment in the mill case, and for me to credit you with the amount; the arrangement would not suit me at this time. I hope that you
186 will get that mill up soon on Willow Creek. I will assure you that it is pretty hard on me if I am obliged to lay out of the use of the money invested in machinery for it much longer; four or five thousand dollars laying idle simply in consequence of your not getting the mill up is no small item. One-half of the profits of a flouring mill will amount to something, and you should hur'y up your cakes, for I cannot stand such losses much longer. From present appearances I have lost the interest on the investment for one year, which, of course, you would properly be held answerable for, but if you push it now with energy you can make more reasonable terms with me in the end than you can if you still treat the matter with so much indifference. I cannot see, friend Drew, why you should be so slack and indifferent in your business. I always looked upon you as one of our most prompt & energetic men. You certainly have a plenty of property that you can convert into money and put through all that you have undertaken. I rely in the matter solely upon you, and will expect for you to put your shoulder to the wheel and go ahead.

Yours, &c.,

A. J. DAVIS.

HELENA, *Jan'y 27th*, 1875.

Mrs. SARAH J. FREDERICKS:

187 I received yours of the 14th instant a few days since. You seem to talk a little more rational. You say that you wish to do what is right, and, if so, bring Mr. Frederick over with you and there will be no trouble about settling everything up. After our matters are settled up I will then make a proposition to buy or sell. I am satisfied

that I could not run the mill to your satisfaction, and I know that you could not to mine; anything that we cannot agree upon we will refer it to persons that are fully conversant with the matter referred and abide their decision. I think there will be but a few points and possibly not any but what we can settle without arbitration, but should there be, and if we both desire to be just and fair, we certainly will be willing to submit it to the judgment of persons who are disinterested and have a full knowledge of the matter. I have a memorandum of all the matters that were talked over at your place and seemed at that time satisfactory. If you are disposed to act right you will find me always ready to meet you upon those grounds. I regret to hear of your bad health and hope ere this you have quite recovered. If you will write me and let me know when you will be over, so that I will be here to meet you, I will be much obliged; there will be no use of your coming over
188 unless he comes with you; if you are both here I think there will be no trouble whatever.

Yours truly,

A. J. DAVIS.

HELENA, *Sept'r* 30, 1873.

Rec'd of A. J. Davis in good order 2 gates for water-wheel; 3 sets of boxing with bolts; 1 Lighten pully with step; 1 suction fan; 3 sets couplings; 4 sets of 2-in. boxing; 6 bolts; 8 kegs; 2 saucer; 1 Lighten screw and one wrench for same; 2 ear-pins for burs; I shaft with 5 cog wheels; one shaft with 2 flanges; one shaft; one shaft with 6 flanges; 4 flanges; 3 steps complete. All of which I agree to deliver in like good order to W. H. Drew or his agent at Willow Creek without delay, the whole weight being 1,213, the freight to be paid on return of receipt in good order at 50 cents per 100 ℔.

(Signed) JOSEP H. TINSLEY.

HELENA, *October* 13, 1873.

Received of A. J. Davis in good order 2 mill burs 3,200 ℔; 2 spur wheels, 540 ℔; 2 flanges, 70 ℔; bale and driver, 65 ℔; 1 shaft with coupling attached, 166 ℔; 4 bars iron, 30 ℔; 2 shafts, 182 ℔; 1
189 cog-wheel, 108 ℔; 1 shaft, 237 ℔; 2 flanges, 39 ℔; one shaft with wheel; 2 flanges; 3 p's small shafting with wheels; 1 hopper; 2 gudgeons with flanges; 2 large flanges; one mill spindle; 2 rolls belting; 2 boxes elevator cups, Babbitt, bolts, &c.; one b'd clothing—701 ℔;) 1 box bolting cloth, 3 ℔; 1 rod galvanized iron, 38 ℔; 1 roll wire screening and 7 mill picks, 50 ℔. All of which I agree to deliver in like good order to W. H. Drew or his agent at Willow Creek, Gallatin County, freight to be paid on return of receipt at the rate of 62½ cents per hundred pounds.

(Signed) HENRY CLANSFER.
C. KEIGER.

TERRITORY OF MONTANA,
County of Gallatin, ss:

I, Theo. Muffly, clerk of the first judicial district court of Montana Territory, in and for the county of Gallatin, hereby certify that the foregoing on pages from one (1) to eight (8) inclusive contains a full, true, and correct copy of the letters and bills of lading admitted in evidence in the case of Sarah J. Fredericks, plaintiff, against Andrew J. Davis and Caleb Gilbert, defendants, in said court, and that the same is a supplement to the original transcript in said case, and now on file

in the office of the clerk of the supreme court of Montana Territory.
190 In testimony whereof I hereunto set my hand and affix the seal of said district court this 12th day of January, A. D. 1878.

{SEAL OF THE DIST. COURT, FIRST JUDICIAL DIST., GALLATIN COUNTY, MONTANA TERRITORY.} THEO. MUFFLY, *Clerk.*
By AMIE J. MALIN, *Deputy Clerk.*

And on the same day the said defend' and appellant, Andrew J. Davis, by his attorneys, Chumasero & Chadwick, filed herein his brief of points, authorities, and references, of which said brief, in words and figures, the following is a copy, to wit:

In the supreme court of the Territory of Montana, January term, 1878.

SARAH J. FREDERICKS, PLAINTIFF & RESPONDENT,
vs.
ANDREW J. DAVIS ET AL., DEFENDANT AND APPELLANT.

Points & authorities of defendant Davis.

A new trial should have been granted for the errors which are shown to have occurred by the bills of exceptions.

1. The deposition of Myers should have been suppressed, because—

a. The notice was insufficient. It did not designate the time
191 when the commission under which it was taken was to be applied for.

b. The notice given was to take deposition in a case wherein Sarah J. Fredericks was plaintiff and Andrew J. Davis was defendant, and was not consequently taken in this case in which it was read in evidence.

c. The commission was issued in a cause wherein Sarah J. Fredericks was plaintiff and Andrew J. Davis and Caleb Gilbert were defendants, being a different case from the one in which the notice was given, and that which was tried and in which it was read in evidence.

d. It was not taken by the officer named as the party to take it.

e. The certificate of the person taking it was insufficient. It does not show that the witness was sworn in the case as required by law.

f The certificate does not even show that it was taken by a notary public, or that it had or attached any official seal to that effect, and is in other respects insufficient.

2. The deposition of Drew should have been suppressed.

a. The *deposition* was issued to J. Logan and executed by one R. R. Banker, who was not named as the person. We urge that where a person is nominated as commissioner he alone is the party authorized, and that it can only be issued generally "to any judge, &c." when
192 the name of a suitable person is unknown; it should not be directed to both a named commissioner "or any other person."

b. There is no proper certificate of the official character of the person assuming to act as a justice of the peace in taking the deposition. The only certificate is that of a deputy recorder or a person who assumes so to be. (See Statutes M. T., p. 130, sec. 476; U. S. Rev. St., sec. 906.)

3. The deed from Drew to plaintiff was improperly admitted. The acknowledgement was defective.

a. The certificate does not show that Drew and his wife, who purport to have executed the conveyance, were personally known to the officer taking the acknowledgement. The word "personally" is material—the language of the statute is mandatory. (Stats. M. T., p. 396, secs. 3, 6, 7, 21.)

4. The deposition of George L. Kent should have been suppressed, no notice of the taking of the same having been served upon the defendant or his attorneys.

5. The questions to witness Davis were proper and competent questions, and should have been permitted to be answered. (See pages 12, 13, 78, & 79 of record.) The action was for partition of property and for a lien of the mortgage executed by plaintiff to Gilbert on the half
193 claimed by her. The defendant Davis denies the co-ownership of the plaintiff in the property, and alleges that the interest standing in her name actually belonged to her husband, W. A. Fredericks, and was placed in her name to cover and conceal it from his creditors, of whom Davis was one; and that the mortgage to Gilbert was executed without consideration and for the same fraudulent purpose. If, as Davis claimed, the conveyance from Drew was without consideration, and that W. A. Fredericks was the real owner, and indebted to Davis, the conveyance to Fredericks' wife, the plaintiff in this case, was void as to him, and the questions were competent and proper.

6. The conversations inquired of as having occurred between defendant Davis, W. A. Fredericks, and Drew were proper to be given in evidence. Their declarations regarding the property while owning it were material and competent (p. 77, transcript.)

7. The questions asked (see pages 16, 17, & 18) we urge were competent, and the court erred in refusing to permit them to be answered.

8. The letters offered in evidence were competent for the purpose for which they were offered. (See pages 74 & 75 transcript and pages 36 to 57 supplemental transcript.)
194 They were evidence showing the fraudulent purpose of the deed to plaintiff, and if fraudulent, then the property was liable for the indebtedness of Davis in the first instance before any part of the avails thereof could rightfully be applied to the payment of the fraudulent mortgage of Gilbert.

9. Davis should have been permitted to testify as to the declarations of Fredericks and Drew while the mill was in process of construction.

10. The 3d instruction (page 84 of transcript) proceeds upon the assumption that the mere fact that words of warranty in the bill of sale of the saw-mill as against Davis constitute an estoppel, and charges the jury that Davis is thereby estopped from showing what was the consideration, if any, or that there was none, or that it was a fraudulent conveyance. Consideration may always be inquired into, and we contend that if the original agreement was for a conveyance to Fredericks, but was afterwards at his request conveyed to his wife, the plaintiff, he, Davis, had the right to attack it for any fraud that existed, and to carry out which was the intent and purpose of Fredericks in procuring the conveyance to his wife, Davis being at the time a creditor of
195 Fredericks. He had the right to attack the bona fides of Fredericks and his wife in the transaction, and to subject the property and its proceeds to the payment of his debt. It was error to permit Fredericks to testify as a witness.

11. The same objection applies to the 4, 5, 7, 8, and 12th instructions.

12. The 11th instruction is too strong; a preponderance of evidence is

all that should be or is required. It is not proper to say that the jury must be satisfied; that Davis was bound to show by competent evidence to the satisfaction of the jury, &c.

13. We contend that each one of the instructions asked for by Davis, and which were refused by the court, should have been given, and that the refusal of the court to give the same was error.

14. The court erred in going into court during the interval of adjournment, and without opening court or sending for the parties receiving the verdict.

15. For these and the other errors assigned in the motion for a new trial, we claim that the decree entered in this case should be set aside and new trial ordered.

CHUMASERO & CHADWICK,
Att'ys for Appellant.

196 And on the same day the said plaintiff and respondent Sarah J. Fredericks, by her attorneys Johnston & Toole et al., filed herein her brief of points and authorities, of which said brief, in words and figures, the following is a copy, to wit:

Respondent's brief.

In the supreme court Montana Territory, January term, A. D. 1878.

SARAH J. FREDERICKS, RESPONDENT,
vs.
ANDREW J. DAVIS ET AL., APPELLANTS.

1. The deposition of Myers was taken before the officer authorized to take the same, and the one named in the commission—"a notary public, and his seal attached to the certificate." Proof of service was had in open court of service of notice and interrogatories on Robert Vivion, attorney of defendant Davis. It was the only case pending in said court in which Sarah J. Fredericks was plaintiff and A. J. Davis was defendant at the time the same was taken. (See bill of exceptions, page of transcript.) This deposition was taken under section 1, p. 49, 8th session laws. The evidence in said deposition was of little, if any, importance in said cause.

2. The deposition of Wm. A. Drew was taken under the same provisions of the session laws of the 8th session M. T. legislature.

197 The commission issued to J. Logan or any other justice of the peace. The certificate of the deputy clerk is the same and of like effect as the clerk in person. He was the proper officer to certify to the official character of the justice taking the deposition. (Harstin's Practice, page 267; 25th California, pag' 184, Muller vs. Boggs; 36 Cal., 202, Enmial vs. Webb.) The deed from Drew to plaintiff is sufficient. If it were not, Davis is in no situation to take advantage of it. The deposition of Kent was taken in pursuance of the provisions of the statute. Due notice was served, as shown by the affidavit of W. E. Cullen, esq. The questions asked Davis and ruled out by the court under objection of plaintiff were properly so ruled. The letters of Fredericks and Drew were admitted in evidence for the only purpose they were admissible—that of impeachment. Davis was in no condition to impeach the bill of sale given to plaintiff. If there was any fraud in that bill of sale he was a party to it. He should not be permitted to take advantage of his own wrong. This case was fairly submitted to

the jury under the instructions of the court and the evidence. Every material fact was found in favor of the plaintiff, and undoubtedly righteously so found. We think under the law and the evidence
198 substantial justice has been done without an error to the prejudice of appellant Davis, and that the judgment should be affirmed.

JOHNSTON & TOOLE, &
SHOBER & LOWRY,
Att'ys for Respond't.

And afterwards, to wit, on the 24th day of January, A. D. 1878, said cause came on to be heard before said supreme court on the said transcript of record; was argued by counsel for the respective parties and submitted. Thereupon the court took the case under advisement until the next term of this court.

In the supreme court of the Territory of Montana, August term, A. D. 1878.

And afterwards, to wit, on the 14th day of August, A. D. 1878, the said cause came on before the court for decision on appeal, whereupon the court delivered its opinion herein in writing, of which, in words and figures, the following is a copy, to wit:

199 In the supreme court of Montana Territory, August term, A. D. 1878.

SARAH J. FREDERICKS, PLAINTIFF & RESPONDENT, *vs.* ANDREW J. DAVIS AND CALEB GILBERT, DEFENDANTS AND APPELLANTS. } Appeal from Gallatin County, 1st district.

Opinion of the court delivered by Wade, Chief Justice.

The plaintiff brings this action for partition and an accounting, alleging that she is tenant in common with the defendant Davis, and the owner of an undivided one-half of a certain flouring mill and premises, situate in the Upper Willow Creek Valley, Gallatin County; that she has expended large sums of money in improving and repairing and operating the same; that defendant Gilbert, as her mortgagee, holds a lien thereon; that the same cannot be partitioned; whereupon she asks for a sale thereof; for an accounting between herself and Davis, and for a distribution of the proceeds of sale according to the respective rights, liens, and interests of the parties. The defendant, Davis, admits that he is the owner of the undivided one-half of the property, but denies that the plaintiff has any interest therein, and avers that W. A. Fred-
200 ericks, the husband of the plaintiff, is his cotenant and the owner of an undivided one-half thereof; charges that the title of plaintiff and the mortgage to Gilbert are fraudulent and void, taken and given to hinder, delay, and defraud creditors, at the instance of W. A. Fredericks, the real owner; and for a cross-complaint alleges that W. A. Fredericks, at the time of the erection of said flouring mill, and prior thereto was greatly indebted to this defendant, for which the defendant secured a lien upon Fredericks' interest in the mill by commencing a suit against him and levying an attachment thereon; whereupon he asks that the

mortgage to Gilbert and the conveyance to the plaintiff be declared null and void; for an accounting between himself and Fredericks, and prays that the property be sold and the proceeds brought into court to await the order of distribution thereof. A brief statement of the facts is necessary to present the questions raised on this appeal. It appears that prior to July 1, 1871, Davis held the title to a certain saw mill, situate near Bozeman, Gallatin County, an undivided one half of which he says he held in trust for W. A. Fredericks, the owner, the plaintiff *the plaintiff* and W. H. Drew declaring that Fredericks had no interest therein.

Be this as it may, on that day, by a conveyance or bill of sale, in
201 writing, Davis sold and conveyed to the plaintiff and to W. H. Drew the said saw-mill, for the sum of $2,000.00, together with all the privileges and appurtenances thereto belonging, agreeing to warrant and defend the title to the property so sold, which instrument of conveyance was duly recorded in the Gallatin County records. It further appears that on the 30th day of July, 1872, Davis and W. H. Drew entered into a contract in writing for the construction and erection of a flouring mill in the Upper Willow Creek Valley; that pursuant to the terms thereof, such mill was erected, and that each of said contracting parties became the owner of an undivided one-half interest therein, and the rights, privileges, and premises thereto belonging. W. A. Fredericks was a millwright and worked for Drew in the construction of the mill, and subsequently, upon its completion, leased Davis' interest and took charge of the business of manufacturing flour therein. On the 30th day of March, 1874, the plaintiff sold her interest in the saw-mill to Drew for $2,000.00, receiving in payment certain notes and securities, and at the same time Drew sold to plaintiff his interest in the flouring mill for the sum of $2,000.00, which sum he and the plaintiff both
202 say was paid in cash at the time of the sale and purchase, which sale was duly evidenced by a deed of conveyance, duly executed by Drew and wife to plaintiff, and recorded in the county records. After the plaintiff had thus acquired Drew's interest in the mill, W. A. Fredericks, her husband, continued the business of manufacturing flour therein until the expiration of his lease from Davis; and subsequently thereto the plaintiff brings this action for partition, basing her right and title to the undivided one-half of the mill and premises upon the deed thereof from Drew and wife to herself. Davis attacks this conveyance by alleging that W. A. Fredericks was the owner of the undivided interest in the saw-mill, and that the same was conveyed to the plaintiff to hinder, delay, and defraud creditors, and that the plaintiff traded her interest in the saw-mill thus acquired to Drew for his interest in the flouring mill, whereby her title to the flouring mill became fraudulent and void. On the trial the defendant, Davis, for the purpose of showing that his bill of sale and conveyance of the undivided one-half of the saw-mill to the plaintiff was fraudulent and void as against creditors, offered to prove the consideration for such; that the same was paid by W. A. Fredericks, the husband of plaintiff, to whom he offered to convey,
203 but was directed by the husband to convey to his wife, the plaintiff, the declarations of the husband that the property belonged to him, and also declarations of the wife to the same effect. This testimony was excluded, and its exclusion is assigned as error.

In order to appreciate fully the nature of the evidence thus sought to be introduced, it should be further stated that Davis had previously testified that W. A. Fredericks was the real owner of the undivided one-half of the mill conveyed by him to plaintiff; that Davis was the trustee of Fredericks, holding this title for him; that at the time of this con-

veyance Fredericks was largely indebted to Davis and others and w
insolvent. He offered further to prove, not only that Fredericks w
the real owner of the property, but that he paid the consideration the
for mentioned in the bill of sale. It therefore appears that Davis,
the time of the conveyance to plaintiff, knew that she had no intere
in the property conveyed, and that as to creditors, such conveyance w
fraudulent and void, and with this knowledge he promised to warra
and defend her title to the property. In view of these facts was t
testimony offered on behalf of Davis properly excluded? If t
204 sale was fraudulent, Davis helped to perpetrate the fraud, a
with a full knowledge of all the facts, could he under such circu
stances impeach his own conveyance by which the fraudulent sale w
executed? Having promised to warrant and defend the title of plainti
could he attack his own conveyance to show such title fraudulent a
void? The mere asking of these questions suggests the inevitable a
swer they must receive. No man can be allowed to take advantage
his own wrong. Davis, with a full knowledge of all the facts, promis
to warrant and defend a title he knew to be fraudulent, and he cann
now be heard to declare the fraud in order to set such title aside. H
cannot impeach his own deed. He cannot falsify his own warranty.
far as he is concerned the title of the plaintiff in the saw-mill, after h
bill of sale, conveyance and warranty, was perfect. This doctrine
supported by the case of Phillips vs. Wooster, 36 N. Y., 414, where
the court says: "The position which the plaintiff occupies in relation
the transaction complained of as fraudulent excludes him from allegi
the fraud or claiming any benefit against it. The conveyance again
which he now seeks to derive advantage from the property w
205 made by himself, with a full knowledge of all the facts as th
existed at the time, as we are bound to presume, since he h
shown nothing to the contrary. So that if the money paid was t
debtor's, as he now insists it was, and the conveyance to the wife ther
fore fraudulent as against creditors, it was not fraudulent as against hi
for he was not only consenting to the act, but himself performed it
And so if the money paid for the saw-mill was the money of W.
Fredericks, and the conveyance to his wife, therefore fraudulent
against creditors, it was not fraudulent as against Davis, for he was n
only consenting to the act with full knowledge of all the facts, but hi
self performed it.

(See also Gales vs. Mowery, 15 Gray, page 564.)

(Dodge et al. vs. Freedman's S. & Trust Co., 93 U. S., 383.)

(Harvey vs. Varnly et al., 98 Massachusetts 118.)

The proposed testimony was properly excluded. In another view
the case this testimony was immaterial. Admitting that the conve
ance of the saw-mill from Davis to the plaintiff was fraudulent, and th
Davis stood in a position to take advantage of the fraud, there is not
ing in the case to impeach or in any manner to invalidate t
206 conveyance of Drew to the plaintiff of his undivided one-half i
terest in the flouring mill, whereby she became a tenant in co
mon therein with Davis and entitled to demand partition thereof. T
plaintiff, Drew, and Fredericks all testify that the plaintiff, from her ov
separate funds, paid to Drew $2,000.00 in cash for his interest in t
flouring mill, and there is no attempt upon the part of Davis to co
tradict this testimony. And so the transactions in relation to the sa
mill, however fraudulent they might have been, became wholly imm
terial, because not in any way connected with the plaintiff's acquisiti
of title to the flouring mill.

2. The defendant Davis attacks the deposition of W. H. Drew, because the official character of the justice of the peace before whom the same was taken in Arizona is authenticated by the certificate of a deputy county recorder, and not by the recorder himself. This certificate does not come within the purview and is not controlled by the act of Congress in relation to the authentication and proof of records, &c., in the different States (Revised Statutes, sec. 906) nor by our own statute as to affidavits taken before a judge of a court of another State or foreign country (Cod. Stats. sect. 476, page 130), but is controlled
207 by the statute of Arizona to which we must look to determine its validity. The statute of Arizona (Compiled Laws 56, sect. 8) requires each justice of the peace, before entering upon the duties of his office, to file his official bond with the county recorder. The Arizona statute also provides that the recorder of each county may appoint a deputy recorder, and makes the recorder and his sureties responsible for the faithful performance of his duties by such deputy. The act does not define the authority or point out the duties of the deputy recorder, and in such a case the deputy, duly appointed and qualified, may perform any act that his principal might legally perform. "In general, a deputy has power to do every act which his principal might do." (Bouvier Law Dict., 463. See also Emmal vs. Webb, 36 California, page 197. Miller vs. Boggs, 25 Cal., 184. Hareton's Practice, 267.) The certificate authenticating the official character of the justice of the peace before whom the deposition was taken was properly made under the laws of Arizona by a deputy recorder. The commission was issued to J. Logan, or any acting justice of the peace of Mohave County, Territory of Arizona, and the deposition was taken by R. R. Banker, a justice of the peace of said county, at the time and place named. The officer so tak-
208 ing the deposition had authority under the commission to take the same, and the objection that the deposition was not taken by J. Logan was properly overruled. The depositions of George L. Kent and Wm. H. Myers appear to have been taken in pursuance of notices properly served. Counsel for the defendant say that the court erred in giving to the jury the several instructions numbered 1, 2, 3, 4, 5, 6, 7, and 8, and also in refusing to give instructions asked for by Davis and numbered 1, 2, 3, 4, 5, and 6, but they do not deign to point out the error complained of, nor to give any reason for their apparently confident assertion thereof And we would be entirely justified in concluding that they had no reason to give, and that they indulged the hope that the court would be able to discover error when they had failed so to do. We have been as unsuccessful as counsel in discovering any errors in the instructions, and all the questions that might have been raised thereon have been substantially disposed of in the first subdivision of this opinion in passing upon the admissibility of the evidence therein mentioned. Davis objects that the deed from Drew to plaintiff of his undivided interest in the flouring mill was not properly acknowledged. If such were the fact, the creditors of Drew, or the
209 grantees of the plaintiff might object, but Davis does not stand in a position to do so. He cannot raise the question. If W. A. Fredericks is not his cotenant in the mill, and the owner of an undivided one-half thereof, then his defense entirely fails, and it is wholly immaterial to him, and is a matter about which he cannot inquire in this action, under his answer as to who is the owner of such undivided one-half of the mill. If Fredericks is not the cotenant of Davis in the mill, then so far as Davis is concerned it is a matter of no consequence

in this action who is such cotenant. As to the reception of the verdict there is nothing in the transcript to show that the verdict was not received in open court in regular form after the names of the jurymen had been called by the clerk. No exception whatever was saved as to the manner in which the verdict was received, and we are not called upon to express an opinion upon alleged errors to which no exceptions were taken.

The judgment is affirmed with costs.

DECIUS S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
HENRY N. BLACK,
Asso. Justice.

210 Thereupon judgment on appeal was duly entered in this cause as follows, to wit:

Judgment on appeal.

In the supreme court of Montana Territory, August term, A. D. 1878.

SARAH J. FREDERICKS, PLAINTIFF & RESPONDENT,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEFENDANTS & APPELLANTS.

Whereas, in the present term of August, in the year of our Lord one thousand eight hundred and seventy-eight, this cause came on in this supreme court for determination on appeal; whereupon it is now here ordered and adjudged by the court that the judgment and decree of the district court of the first judicial district of this Territory, in and for the county of Gallatin, entered in this cause on the 17th day of May, A. D. 1877, be, and the same is hereby, affirmed with costs. And it is further ordered by the court that the said plaintiff and respondent, Sarah J. Fredericks, recover against the said defendants and appellants, Andrew J. Davis and Caleb Gilbert, dollars for her costs herein expended, and have execution therefor.

211 Judgment on appeal entered Aug. 14, 1878.

And afterwards, to wit, on the 19th day of August, A. D. 1878, came the said defendant and appellant, Andrew J. Davis, by his attorneys, Chumasero & Chadwick, and prays the court for its order granting an appeal herein from the said judgment of this court to the Supreme Court of the United States; also for an order fixing the amount of the bond on said appeal.

Whereupon, on consideration, it is ordered by the court that the appeal prayed for herein as aforesaid, be, and the same is hereby, granted; and that the bond on such appeal be fixed at the sum of ten thousand dollars.

Thereupon, at the request of appellant Davis, the court made certain special findings of fact herein, and caused the same to be entered of record, of which said findings, in words and figures, following is a copy, to wit:

Special findings.

In the supreme court of Montana Territory, August term, A. D. 1878.

SARAH J. FREDERICKS, PLAINTIFF & RESPONDENT,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEFENDANTS AND APPELLANTS.

212 1. The court finds that Sarah J. Fredericks, the plaintiff, is the owner of the undivided half of the premises described in the complaint, and that the defendant, A. J. Davis, is the owner of the other one undivided half thereof.

2. That defendant Davis is estopped by his conveyance to Drew and Sarah J. Fredericks, recited in the opinion of the court, from impeaching the title of Sarah J. Fredericks, and showing that the same was fraudulent as against said Davis, one of the creditors of W. A. Fredericks, the husband of said Sarah J. Fredericks.

3. We adopt the statement of facts contained in the opinion of the court in this case as the facts and so find.

D. S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
HENRY N. BLAKE,
Asso. Justice.

Filed & entered August 19, 1878. I. R. Alden, clerk.

213 And afterwards, to wit, on the 23d day of August, A. D. 1878, the said appellant Davis filed herein his bond on appeal in the sum of ten thousand dollars, the penalty fixed by the court, and which was duly approved before filing, which said bond or undertaking is in the words and figures following, to wit:

Know all men by these presents that we, Andrew J. Davis, as principal, and Samuel T. Hauser and Anton M. Holter, as sureties, are held and firmly bound unto Sarah J. Fredericks in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said Sarah J. Fredericks, her executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the twenty-first day of August, A. D. one thousand eight hundred and seventy-eight.

Whereas lately, at a supreme court of the Territory of Montana, at the August term thereof, A. D. 1878, in a suit depending in said court between Sarah J. Fredericks and Andrew J. Davis and Caleb Gilbert judgment was rendered against the said Andrew J. Davis and
214 Caleb Gilbert, and they having obtained an allowance of an appeal to the Supreme Court of the United States at the said August term of said Supreme Court, A. D. 1878, from the said judgment of the supreme court of said Territory to reverse the judgment in the aforesaid suit:

Now the condition of this obligation is such that if the said Andrew J. Davis and Caleb Gilbert shall prosecute their appeal to effect, and answer all damages and costs if they shall fail to make their plea good,

then the above obligation to be void; else to remain in full force and virtue.

A. J. DAVIS. [SEAL.]
S. T. HAUSER. [SEAL.]
A. M. HOLTER. [SEAL.]

Signed, sealed, & delivered in the presence of—

Approved by

DECIUS S. WADE,
Chief Justice of the Supreme Court of Montana Territory.

TERRITORY OF MONTANA,
Lewis and Clarke County, ss:

Samuel T. Hauser and Anton M. Holter, being first severally sworn, each for himself deposes and says that he is worth the sum mentioned in the within bond as the penalty thereof over and above all his just debts, liabilities, and exemptions, and that he is a freeholder in said Territory.

215

S. T. HAUSER.
A. M. HOLTER.

Subscribed and sworn to before me this 23rd day of August, A. D. 1878.

[NOTARIAL SEAL.] WILLIAM CHUMASERO,
Notary Public.

Filed August 23rd, 1878. I. R. Alden, clerk.

216 In the supreme court of Montana Territory, August term, A. D. 1878.

SARAH J. FREDERICKS, PLAINTIFF AND RESPONDENT,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEF'TS AND APPELLANTS.

I, I. R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify that the foregoing two hundred and sixteen pages, numbered from one to two hundred and sixteen, inclusive, contain a full, true, and correct transcript of certain records, pleadings, and proceedings made, filed, and had in the above-entitled action as the same remain on file and of record in my office.

Witness my hand and the seal of said court hereto affixed this first day of October, A. D. 1878.

[SEAL.] I. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 177. Andrew J. Davis and Caleb Gilbert, appellants, vs. Sarah J. Fredericks. Montana Ter't'y supreme court. Filed 19th April, 1879.

OFFICE SUPREME COURT U.S.
FILED
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CLERK

Supreme Court of the United States.

No. 177.

ANDREW J. DAVIS ET AL., APPELLANTS,

vs.

SARAH J. FREDERICKS.

R. T. MERRICK,
M. F. MORRIS,
For Appellant.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

No. 177.

ANDREW J. DAVIS ET AL., APPELLANTS,

vs.

SARAH J. FREDERICKS.

PLEADINGS AND ISSUES.

This case was brought by the appellee, Sarah J. Fredericks, the wife of W. A. Fredericks, for the purpose of having a sale made of certain mill property, which she alleges that she holds in common with A. J. Davis, the appellant, and of the undivided one-half of which she claims to be seized in her own right, and as of her sole and separate estate. (Record, p. 48.)

The answer of the appellant, Davis, denies that said Sarah J. Fredericks has any interest in the said property, and avers that W. A. Fredericks, the husband of Sarah, is tenant in common with him, the said Davis, of said premises, each being entitled to an undivided moiety thereof.

The answer of the appellant then proceeds to set forth, for a further defense to said action, "as well as for a cross complaint, or bill therein;" that the said W. A. Fredericks was indebted to him, the said appellant, and "to divers and sundry other parties, in large sums of money;" and that for the purpose of defrauding his said creditors the said W. A. Fredericks had caused a conveyance of the undivided moiety of said property to be made to his said wife Sarah,

and that said conveyance could have no other effect than to vest in said Sarah the naked legal title to said premises in trust for her said husband, W. A. Fredericks. That the said W. A. Fredericks was, at the time of said conveyance, and is still insolvent, and that he has been, since November, 1873, in the exclusive possession of said mill and premises and in the exclusive enjoyment of the profits arising therefrom; that such possession was held by said Fredericks under his title to one undivided moiety, and under a lease from appellant to him of the other moiety; that the term of said lease ended March, 1875, but said Fredericks refused to admit appellant into possession notwithstanding his demand upon him to be admitted. That to secure the debt and demands due him, the said appellant, he had brought suit against the said W. A. Fredericks in March, 1875, in the county of Gallatin, in Montana, and at the same time caused a writ of attachment to be issued, which had been duly levied upon said undivided one-half of said mill, fixtures, and appurtenances, as the property of said W. A. Fredericks, which was still in force and effect, and a lien upon said mill and premises, by reason of the levy and seizure made in obedience to the mandate of said writ.

The cross-complaint makes W. A. Fredericks a party, and concludes with a prayer that the Court will declare the conveyance of said premises to the said Sarah J. Fredericks void as to the creditors of the said W. A. Fredericks; that an accounting may be had of the earnings and profits of the mill, and that the property may be sold and the proceeds brought into court to await the order of distribution thereof, and for general relief. (Record pp. 50, 51, 54, 55, 56, and 57.)

Replication of Sarah J. Fredericks, (pp. 53 and 61.)

Answer of W. A. Fredericks, (p. 61.)

Certain issues were submitted by the Court to the jury for a special verdict.

The issues and findings were as follows:

1. Who owned the property in controversy in this action at the time this action was commenced?

A. A. J. Davis and Sarah J. Fredericks.

2. What interest or share in said property was then owned by the plaintiff, Sarah J. Fredericks?

A. One-half interest.

3. What interest or share in said property was then owned by the defendant, Andrew J. Davis?

A. One-half interest.

4. What interest or share in said property was then owned by the defendant, Caleb Gilbert?

A. Such interest as is set forth by the mortgage.

5. What interest or share in said property was then owned by Wellington A. Fredericks?

A. None. (P. 37.)

The Court having approved the special findings, and the verdict, passed a decree in accordance therewith.

STATEMENT OF FACTS AND QUESTIONS INVOLVED.

The principal facts upon which the appellant claimed that the fraudulent character of the conveyance of the mill property to Sarah J. Fredericks could be established, and the interest of W. A. Fredericks therein shown, were as follows:

In 1871, the appellant held in his name the title to a certain "saw mill;" one-undivided moiety thereof being, nevertheless, held in trust for the said W. A. Fredericks; and the other undivided moiety being the property of the appellant.

In July, 1871, the appellant agreed to sell his interest to one William H. Drew, for the sum of $1,000, and at the same time the said W. A. Fredericks directed appellant to transfer his interest in the premises to the said Sarah J. Fredericks, the appellee.

Subsequently, in 1873, the appellant became the joint owner with said William H. Drew—according to the evi-

dence produced by the appellee—of the mill property, which is the subject of this litigation.

The first mill above referred to is a saw mill, and is spoken of in the record as the "Drew Saw Mill," and sometimes as the "Ault Mill." The second is a "flour mill," and is spoken of in the record as the "Willow Creek Mill."

In March, 1874, William H. Drew conveyed his interest in the "flour mill" to the said Sarah J. Fredericks, and she, at the same time, and as part of the same transaction, conveyed to Drew her interest in the "saw mill," which had been transfered to her by appellant, as above set forth. Appellant claims that this was simply an exchange of property, and the testimony of Drew as to the nature of the transaction indicates a purpose and design so to conduct it as to conceal its real character, and tends strongly to confirm appellants' claim, in regard thereto.

He says the sale by Mrs. Fredericks to him of the "saw mill," and his sale to her of the "flour mill," were parts of one transaction; but that at the same time she paid him $2,000 in money, and he paid her $2,000 "in notes and reliable paper." (p. 22.) All of which Sarah J. Fredericks confirms in her evidence.

The instrument by which the appellant transferred his interest in the "saw mill" to the said William H. Drew, and the interest which he held in trust for W. A. Fredericks to the said Sarah J. Fredericks is as follows:

"GALLATIN CITY, *July* 1, 1871.

"I have this day sold unto Wm. H. Drew and Sarah J. Fredericks a certain mill near Bozeman, know as the Ault Mill, for and in consideration of the sum of two thousand dollars to me paid, *and in consideration of said Ault*, do hereby transfer all my right, title, and interest in and to said property to said Drew and Fredericks, with all the privileges and appurtenances thereunto belonging, including flume, &c., and I do hereby warrant and defend the above premises against all persons claiming through or by me up to this date.

"A. J. DAVIS."

"I hereby certify that the within instrument was received for record this 27th day of October, A. D. 1876, at 4 o'clock p. m., and is duly recorded in volume K of deeds, page 142.

[Seal Gall. Co.] "ANNIE J. MALIN,
"*Recorder.*"

Three years after the date of the foregoing paper, to wit: March 30, 1874, Sarah J. Fredericks filed with the Recorder of Gallatin county, her declaration of intention of transacting business in her own name as sole trader, in accordance with a law of Montana, authorizing such declarations by married women to be made and filed; and on the same day the exchange of property between Drew and herself, above referred to, took place, and he conveyed to her his interest in the "flour mill." (pp. 2, 3, and 4.)

One G. D. Thomas had recovered a judgment against W. A. Fredericks for $12,000, (p. 7,) and appellant offered to prove by the said Thomas that he was the owner of the judgment, spoken of as the "Thomas judgment," and had held the same since sometime in 1871, and that it was unpaid. Upon objection being made, said evidence was ruled inadmissible. (p. 32.)

In the course of the examination of the appellant as a witness, he was asked the following question:

Q. "What was the consideration for said conveyance of July 1, 1871, from you to Drew and plaintiff, and by whom was the consideration paid?"

This question was objected to, and the Court sustained the objection.

The following questions were also asked, and likewise ruled out by the Court,—all objections to the form of questions being waived by counsel:

Q. "Did or did not W. A. Fredericks, the husband of plaintiff, pay whatever consideration was paid?" (p. 6.)

Q. Why was the conveyance from you to plaintiff and Drew made to her? (p. 7, f. 18.)

6. The Court erred in refusing to grant instructions asked by defendant, numbered from one to six.

BRIEF OF ARGUMENT.

The appellant offered to prove that he held the one undivided half of the property mentioned in the paper of July 1, 1871, in trust for W. A. Fredericks, and that no consideration was paid for the transfer of that one undivided interest to Sarah J. Fredericks, but that such transfer was made to her in pursuance of the order and direction of the said W. A. Fredericks, the beneficiary. This proof, if admitted, would necessarily have established the fact that Sarah J. Fredericks was informed of the manner in which the title was held by the appellant; and if she knew that it was held by him in trust for her husband, and transferred to her in obedience to his order, the warranty contained in the paper would be construed and applied in view of these facts known to all the parties interested in the transaction. The appellant did not propose to show anything contrary to his warranty by which any right could be impaired, or injury caused, but simply to prove the facts as they existed and were understood by all the parties at the time of the execution of the paper, and in view of which all the parties acted.

If Sarah J. Fredericks knew that the one-undivided half interest in the premises was held in trust by the appellant for her husband, and that he directed his trustee to transfer that interest to her, without consideration, then she would hold it subject to the same trust under which it had been held by the appellant, and no court could construe the warranty contained in that paper as a warranty against the existence of this trust. Under such circumstances the appellant would not be estopped by his warranty from impeaching the validity of the transfer, upon the ground that it was made in fraud of the rights of creditors, or from showing that the transferree held it in trust, unless the rule of

estoppel is broad enough to apply to him on the general ground of his having been a party to the conveyance.

There is nothing on the face of the paper of July 1, 1871, and nothing in any of the circumstances of the transaction, with which the appellant was connected, that invalidates this instrument. It is claimed to be void as to the creditors of W. A. Fredericks, on the ground that he *intended* to defraud them by causing a transfer of the property to be made to his wife. The question is solely as to the *intention* and the *design* of W. A. Fredericks, with which the appellant had nothing to do, and of which he may have been, and probably was, in ignorance at the time the paper was executed. The appellant held the title to the property in his own name, but W. A. Fredericks was the beneficial owner of an undivided one-half interest therein, and was bound to convey that interest in such manner as the *cestui que trust* might direct. The appellant was, therefore, in no way necessarily involved in the fraud which he alleges tainted the transaction, and cannot in any sense be said to be *in pari delicto*, or to have knowingly consented to the partial execution of a secret fraudulent design, conceived by Fredericks against his creditors, of whom the appellant himself was one.

But, in any event he is not estopped from impeaching the instrument in a proceeding on behalf of himself as well as on behalf of the other creditors of W. A. Fredericks, prosecuted for the purpose of arresting and preventing the consumation of the attempted fraud by subjecting the proceeds of this property, now in the possession of the wife, to the payment of the creditors, in fraud of whose rights it was originally conveyed to her by the order and direction of her husband.

Spring Co. *vs.* Knowlton, 103 U. S., 49.
Taylor *vs.* Bowers, 1 Q. B. D., 291.
Symes *vs.* Hughes, Law Rep., 9 Eq., 475–9.

In the case of the *Spring. Co.* vs. *Knowlton* this Court, in considering questions of this character, refers to the case of *Taylor* vs. *Bowers*, and adopting the rule there laid down, says:

"Taylor *vs.* Bowers (1 Q. B. D., 291,) was an action to recover property assigned for the purpose of defrauding creditors. A verdict was rendered for the plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's bench sustained the verdict, the Chief Justice, Cockburn, delivering the opinion. The defendant then appealed to the court of appeals where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered."

"Lord Justice Mellish, in the court of appeals, said: 'If the illegal transaction had been carried out, the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out; it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action, the law will not allow that to be done.'"

The ruling of the court in the case of *Symes* vs. *Hughes* is to the same effect. In that case the plaintiff, being in pecuniary difficulties, assigned certain household property to a trustee for the purpose of defeating his creditors. The trustee treating the property as his own, assigned to the defendant, he covenanting to provide the assignor with board

and lodging during her life. The plaintiff afterwards became bankrupt, and having made an arrangement with his creditors, filed his bill, praying that the defendant might be ordered to reconvey the property. "Two objections," said The Master of the Rolls, Lord Romilly, "have been raised on behalf of the defendant. The first is that the assignment was made for an illegal purpose, and, it is said, such being the case, the court will not interfere. I think the correct answer to this was given, namely, that where the purpose for which the assignment was given is not carried into execution and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. It is clear, in the present case, that no harm has been done to any creditor, and in fact the suit is now prosecuted for the purpose of enabling the creditors to recover something."

These two cases would seem decisive of the question submitted in the case now before the Court. In fact the appellant's right to impeach the transfer, in this case, rests upon a foundation more uniformly recognized than did the right of the plaintiff to impeach the assignment in the case of *Taylor* vs. *Bowers*. In that case the plaintiff was a party to the fraud, and it was he who made the assignment for the purpose of defeating his creditors. In this case the party impeaching the conveyance is himself one of the creditors designed to be defrauded, and who, though he made the transfer, did so in obedience to the debtor for whom he held the property in trust, and of whose secret *design and purpose* he knew nothing, and there is no pretense that he derived or contemplated deriving any benefit whatever from the transaction.

"To hold the plaintiff entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon."

The appellant claims that the property transferred by him to Sarah J. Fredericks, in March, 1871, in obedience to the direction of her husband, was exchanged by her with Drew for an undivided one-half interest in the "flour mill," which one-half interest Drew conveyed to her on the 31st day of March, 1874.

This proceeding does not propose to disturb the title of Drew to the interest in the "saw mill," which was conveyed to him by Mrs. Fredericks, but its object is to reach her interest in the "flour mill," which she took in exchange therefor, and by establishing the fact that she holds it in trust for W. A. Fredericks to subject it to the payment of his debts. The Court is asked not to aid a party in the perpetration of a fraud, but to arrest it before its final consummation, and in the language of the case last above quoted from, "*the suit is now prosecuted for the purpose of enabling the creditors to recover something.*"

R. T. MERRICK,
M. F. MORRIS,
For Appellant.

IN THE

Supreme Court of the United States

No. 177.

ANDREW J. DAVIS & CALEB GILBERT, APPEL'TS,

vs.

SARAH J. FREDERICKS, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR THE APPELLEE,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term, 1881.

ANDREW J. DAVIS AND CALEB GILBERT, APPELLANTS,

vs.

SARAH J. FREDERICKS, APPELLEE.

No. 177.

BRIEF FOR APPELLEE.

The record in this case is in a bad condition, and it is difficult to arrange the controlling facts in any compact and logical form. We will, however, attempt to state such facts as will present the legal questions raised in the record, without attempting to state them in any considerable detail.

Sarah J. Fredericks, the plaintiff below, and wife of W. A. Fredericks, on the 16th day of March, 1875, filed, in the District Court of the First District of Montana, a petition for partition of certain real estate, being a flouring-mill, situate at the upper end of the "Lower Willow Creek Valley," on the northeast quarter of section 7, township south of range 1 east, in Gallatin county, Montana. The petition alleges that plaintiff is tenant in common with Andrew J. Davis, defendant, and that she is a married woman, possessed of an undivided half of said property, and that Davis

possessed the other half; that she had given a mortgage to one Gilbert, defendant, for four thousand dollars, which was a lien on her half of the property; that she desires partition, which cannot be made without injury to the owners; that since the 15th of December, 1873, there had been no accounting between her and Davis, and that Davis was indebted to her for work and material, in improving, preserving, and operating said property, in the sum of $3,250.

She prays for sale of the property, and that the proceeds, after satisfying said lien, be returned to the court and divided to the parties according to their respective interests. (R. 48.)

This petition, which is the only one we find in the record, was sworn to 15th of March, 1877, and about two years before the first answer of Davis, sworn to 5th of March, 1875. (R. 52.)

W. A. Fredericks, husband of the plaintiff, is made defendant by the last-named answer and cross-petition, and he answers, denying the averments of said answer and cross-petition, on 24th of April, 1875.

Defendant Davis files an amended answer on the 14th of May, 1877. (R. 57.)

This amended answer and cross-bill contains in substance the following averments:

(1) Denies the plaintiff owned any interest in said property; admits Davis owns half said property; avers plaintiff's husband, W. A. Fredericks, is now, and at all times since the mill was built was, the owner of the other half; admits a mortgage to Gilbert was recorded, but denies that it is a lien; avers plaintiff had no interest in the property when the mortgage was made, and the mortgage was without consideration, and was made and recorded without Gilbert's knowledge, for the purpose of defrauding said husband's creditors; denies that Davis owes plaintiff any-

thing for operating the mill, or that she has any interest in the mill or its earnings.

(2) Avers that Davis and said husband are now, and ever since November, 1873, have been, owners of the said mill, and that, at the date last aforesaid, Davis leased to said husband Davis's half of said mill; from which date to the 6th of March, 1875, said husband occupied said premises under said lease.

(3) Avers that said mill was erected out of the labor and means of said husband and of said Davis, and that plaintiff had no interest in, and contributed nothing to, the said mill, and said husband is full owner of one-half.

(4) Avers that at the time of erecting the mill and acquiring said property said husband was, and ever since has been, largely indebted to said Davis, and that, to secure said indebtedness, on the 6th of March, 1875, said Davis caused an attachment to be issued and levied on said husband's part of said property, which is still a lien thereon.

(5) Avers that said husband, being so indebted, in order to defraud said Davis and other creditors, caused a conveyance to be made to plaintiff of the undivided half of said mill and property named in petition, but avers such conveyance gave plaintiff no title except in trust for her husband; also, that said mortgage to said Gilbert is part of the said fraudulent scheme.

(6) Avers said husband is wholly insolvent, and has been in possession of said mill ever since November, 1873, and held and had the use of Davis's part thereof up to March, 1875, when the lease by Davis to said husband expired; at which last date said Davis demanded of said husband a

joint possession of said property, but such joint possession and enjoyment was refused, and that said use is very valuable.

The prayer of the answer and cross-bill is that said husband be made defendant; that all deeds to plaintiff be decreed void as against Davis and other creditors of husband; that the said mortgage to Gilbert be postponed to Davis's liens; that an accounting for the use and profits of the mill be had, and that the property may be sold and the proceeds be brought into court. There is a replication, sworn to by plaintiff 12th of December, 1878. (R. 54.)

It would seem the case was submitted to the jury on questions prepared by the court, on the 14th day of May, 1877, (R. 2,) and the jury returned their special verdict, finding *plaintiff owned the property in controversy, being one-half, and the defendant Davis owned one-half; and that the mortgagee owned the interest set forth in the mortgage, and that said husband of plaintiff owned no interest in the property.*

The following facts are *established* either by written documents not assailed by said Davis, or admitted by him:

First. Davis's answer admits that plaintiff held the legal title to an undivided half of the property in controversy at the date of commencing suit; (R. 56, fol. 143;) so *that plaintiff is admitted by the answer and cross-bill to be entitled to the decree she obtained, unless defendant Davis introduced, or offered to introduce, that which overthrew her legal title.*

Second. The deed by William H. Drew and wife of 13th of March, 1874, (R. 2, 3,) taken in connection with plaintiff's declaration, under the statute, of her intention to become a sole trader, dated 28th of March, 1874, (R. 3, 4,) and also in connection with the contract of said Davis with said Drew, dated 30th of July, 1872, (R. 4, 5,) under which Davis admits Drew became owner of half the flouring-mill,

make out the *same thing*, so admitted by Davis's answer, to wit, that the *legal* title of one-half of said property was at the beginning of suit in the plaintiff.

Third. That prior to the 1st of July, 1871, defendant Davis held the full title to a certain saw-mill near Bozeman, called "The Alt and Parham Saw-mill," one-half of which title he held in his own right, and the other half he swears was held by him for the benefit of plaintiff's husband; (R. 5, fol. 13;) and on the 1st of July, 1871, (R. 6., fol. 13,) the said Davis, defendant, sold by an instrument in writing for $2,000 the said saw-mill to said William H. Drew *and plaintiff*, and warranted and defended the title. On folio 15 (R. 6) Davis swears, "The half interest in said saw-mill was *deeded* to Mrs. Fredericks *by me*." On folio 13 he swears, "I also, at request of Fredericks, *conveyed it, his interest, to his wife, the plaintiff*."

Said instrument of writing is at the top of page 6, and agrees to warrant and defend the title to Mrs. Fredericks, and was duly recorded. (R. 6.)

Fourth. That Davis attempts to defeat plaintiff's said admitted *legal* title to said half so granted by said deed of 30th March, 1874, (R. 2) by Drew and wife to plaintiff, by the oath of himself, (R. 7, fol. 17,) and others *swearing that Drew was paid for said half so deeded to plaintiff by a trade to him* (Drew) *of that half of the saw-mill which he* (*Davis*) *on July* 1, 1871, *warranted to plaintiff*, (R. 6,) and that because plaintiff did *not*, and her husband *did*, own said half of the saw-mill so traded to Drew for his said half of the grist-mill, therefore plaintiff paid nothing for said half, and it belonged to her husband. Davis swears (R. 7, fol. 17, 18,) "Mr. Fredericks stated that he was about to trade his interest in the saw-mill for Drew's interest in the flour-mill. They finally concluded to trade. The conveyance, as they stated, was made from Drew to plaintiff, and from plaintiff

to Drew." All this is denied by Mrs. Fredericks, and the truth of the matter is claimed, by her, to be as stated in the court's opinion, (R. 79, fols. 201, 202,) to wit, that she paid cash for said half of said flouring-mill. But suppose that said oath of Davis is true, and Mrs. Fredericks's half of the saw-mill was traded to Drew for his half of the flouring-mill: then *that* view of the matter must be now accepted as a fact in deciding whether the case must be reversed.

Fifth. Drew, in answer to 11th interrogatory, (R. 20, fol. 52,) and in answer to the 14th cross-interrogatory, (R. 22, fol. 57,) swears positively that Mrs. Fredericks paid him $2,000 cash for said half of said flouring-mill. W. A. Fredericks swears to the same thing. (R. 28, fols. 73, 74.) Plaintiff swears to the same thing; (R. 30, fols. 78, 79;) and plaintiff states, in detail, where and how she got the means to pay, and how she did pay for this half of the mill so deeded to her on the 30th of March, 1874, (R. 2, 3,) by Drew and wife. And, as remarked by the court below, (R. 80, fol. 206,) "*no attempt upon the part of Davis is made to contradict this testimony*" in any of the evidence excluded by the court. In other words, no exception by Davis, to the exclusion of his proffered testimony, is in this record which *bears upon said point that Mrs. Fredericks paid in cash for said half deeded her by Drew.*

So that in determining whether this judgment should be reversed because of injury to Davis wrought by any of the rulings of the court excepted to, it must be accepted as a *fact that nothing in this record preserves any objection or exception to evidence meant to controvert the fact that Mrs. Fredericks was proved to have paid full cash value for said half of the flouring-mill.*

Brief.

Upon the foregoing statement we submit the following points:

First. That since Davis's attack upon the legal title of plaintiff in said half is based on the proposition that the half of the saw-mill was owned by plaintiff's indebted and insolvent husband, and was traded to Drew for half of the grist-mill, and the legal title fraudulently made to the wife of such insolvent, and is therefore void, and since *Davis made to plaintiff* this fraudulent deed for said half of the saw-mill, and since no other creditor of said insolvent than Davis, the maker of the fraudulent deed, has ever asked it, or that by Drew and wife to plaintiff, (R. 2, 3,) to be set aside, therefore Davis, as party to the alleged fraud, cannot maintain a suit to set these deeds aside; and all rulings by the court excluding evidence seeking to show that said deeds of July 1, 1870, (R. 5,) and March 30, 1874, (R. 2, 3,) were void, are free from error.

In addition to the cases cited below by the Supreme Court, (see R. 80,) we refer the court to the following cases in support of the proposition that Davis, as the maker of the alleged fraudulent deed of July 1, 1871, (R. 5,) cannot in equity recover back such property, (or that for which he swears it was traded,) neither on the principle of mistake, nor that his grantee took *in trust* for him, nor upon any other pretext. (Kinney *v.* Consold. Va. Min. Co., 4 Sawyer, 382.)

How thoroughly it is settled that neither a grantor of a title in fraud of creditors, nor his heirs, can ever disaffirm the title he has made, and how wise is the policy on which the rule is founded, will be found strongly stated in the following cases:

Curtis *v.* Price, 12 Ves., 103.
Worsely *v.* De Mattos, 1 Burr., 474.
Malin *v.* Garnsey, 16 Johns., 189.
Reichart *v.* Castelor, 5 Binn., 109.
Drinkwater *v.* Drinkwater, 4 Mass., 354.

And that "*if a* CREDITOR *is a party to such a deed, and acquiesces in it, he cannot afterwards avoid it, nor can any one claiming under him,*" *is equally established.* (See 1 Story Eq. Jur., sec. 371, (10th ed.,) and cases cited in note 7, p. 367.)

It will be seen that the proposition just stated disposes of most of the exceptions to the exclusion of testimony; and also of instructions 1, 2, 3, 4, 5, 6, 7, 9, 11, 12, (R. 34, 35,) asked by plaintiff and given; and of instructions 1, 2, 3, 4, 5, 6, (R. 36,) asked for defendant and refused.

Because Davis cannot as creditor of W. A. Fredericks, or otherwise, attack the title and right of property which, by his deed of July 1, 1871, (R. 6,) vested in plaintiff, or the title and right of property which, by his contract of July 30, 1872, (R. 4, 5,) he vested in Drew, therefore the following exceptions by Davis are not well taken, to wit, folios 14, 15, 16, 18, 19, 20, 22, 34, 81, 85.

Instruction 8, (R. 35,) stating that letters and statements by her husband could not prejudice a title which she, as a sole trader, derived either from the deed of July 1, 1871, (R. 5,) by Davis, or from the deed of Drew and wife of March 30, 1874, (R. 1,) is as obviously right as it is to say that mere hearsay cannot destroy titles of a party in no way in privity with the utterer of the hearsay.

So the attempt by Davis to disprove and show to be fraudulent his covenant with Drew, by which it was agreed that Drew (not Drew and Fredericks) should own one-half of the grist-mill when it was completed, (R. 5,) and to make this proof by the declarations of Drew in contravention not only of the said covenant of Davis, (R. 5,) but also of the deed of Drew made in pursuance of said covenant, (R. 2, 3,) is prohibited by the same rule, which holds that "*if a creditor is party to such a deed,*" (in fraud of creditors,) "*and acquiesces in it, he cannot afterwards avoid it.*" (Olliver *v.* King, 35 Eng. L. & Eq., 312; Baldwin *v.* Caw-

thorne, 19 Ves., 164; Steel *v.* Brown, 1 Taunt., 381; Harvey, *ex parte*, 27 Eng. L. & Eq., 272.)

And the declarations of a grantor, such as Drew was, are not admissible to impeach his own deed. In other words, Drew's declarations, no odds when made, going to show that he held part of the interest deeded to Mrs. Fredericks March 30, 1874, (R. 2, 3,) in trust for her husband, and that his deed to her was fraudulent, will not be admitted against her, if she in no way assented to these declarations. This is because the grantee *is not to be bound, as to the fraudulent nature of such transaction, by the declarations of his grantor, until shown aliunde to be cognizant of or implicated in the fraud.* (12 Ind., 64; 9 Ala., 131; 31 Conn., 428; 4 Iowa, 524; 9 Ind., 323; 1 Mass., 165; 5 Binn., 109; 32 Miss., (11 Smed. & M.,) 469; 3 West Va., 335; 5 Mass., 534; Baldwin's R., 344; 3 Otto, 383, and cases there cited.)

Second. No attempt being made by Davis to meet and overcome the positive proof by the plaintiff that she bought, 30th March, 1874, and *paid the cash for*, one-half of said grist-mill, (see opinion of Supreme Court, R. 80, fol. 206,) therefore the decree in this case was palpably right on *this independent ground;* and as *all* exceptions in the case relate to *other* points than this, to wit, to the ruling of the court as to who owned the saw-mill, and as to the plaintiff's husband owning some of the grist-mill, and as the plaintiff was entitled to said decree in virtue of her said *bona-fide* purchase for cash, from Drew, no odds how much or little, as between Drew and the husband, the latter was entitled to in equity, therefore the said exceptions in the record become *immaterial;* because the decree was *right* on the ground of said *bona-fide* purchase by Mrs. Fredericks for cash. As charged in instruction 12, (R. 35,) if Davis, by the contract of 30th of July, 1872, (R. 4, 5,) put all of the undivided half of the title of the grist-mill in Drew, instead

of in Drew and W. A. Fredericks, so as thereby to cheat creditors, then *he* cannot retreat from *that*. If it was honestly put in Drew's name, then he could and did, on 30th March, 1874, deed it to Mrs. Fredericks.

APPELLANTS' BRIEF.

The propositions we have gone over cover, we think, all the points in the appellants' assignment of errors. (Brief, 7, 8.)

That brief considers but one point, to wit, that the court erred in refusing to suffer Davis to prove, as he tendered to do, that his deed of warranty of July 1, 1871, (R. 6,) was made to Mrs. Fredericks without consideration from her, and therefore in trust for her husband, and was fraudulent. The brief insists that Davis should have been suffered to destroy the *apparent* title his deed to Mrs. Fredericks conveyed, and to have subjected the property which *he says* that title, by him to Mrs. Fredericks, paid for, (to wit, half the grist-mill,) to the payment of Davis's claim against her husband.

In support of this proposition, the opposing brief relies on—

Spring Co. *v.* Knowlton, 103 U. S., 49.

In reply to this point, we submit the following considerations:

1st. Neither the last-cited case, nor any of those cited in the opposing brief, are analogous to the present case.

Spring Company *v.* Knowlton simply decides that "a party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, *while it remains executory*, rescind it and recover the money by him advanced thereon to the other party *who had performed no part thereof*."

In the present case the fraud alleged by Davis, consum-

mated in making his deed, to defraud creditors, to Mrs. Fredericks, was not only *mala prohibita*, but *mala in se*; being prohibited *both* by morality, the common law, and by statute.

The fraudulent act alleged by Davis did not only not remain "*executory*" on the part of either party, but was fully consummated (1) by Davis's deed to Mrs. Fredericks (folio 13, 14); by (2) its being put upon the public records; by (3) possession of the property being given by Davis to Mrs. Fredericks; by (4) the fact that said half of the saw-mill was sold to Drew; and (5) by Davis having acquiesced in his said conveyance to Mrs. Fredericks from its date, July 1, 1871, up to the time of his filing his cross-bill.

Again, that this court, in the case of Spring Co. *v.* Knowlton, did not mean to lay down a doctrine at war with the decisions in New York, of the Court of Appeals of that State, in regard to a fraudulent grantor (who was also a creditor of the fraudulent debtor) being suffered to attack his own fraudulent deed, is obvious from the fact that this court quotes some four cases from New York in Spring Co. *v.* Knowlton, *supra*. Surely this court did *not* mean to use these four cases as supporting a doctrine such as opposing brief attributes to it, because such doctrine is in the teeth of the repeated decisions of the Court of Appeals of New York.

The case cited by the court below, (R. 80,) of Phillips *v.* Wooster, 36 N. Y., 412, is precisely the present case. There the court held that "*the grantor of premises to a married woman cannot complain that the conveyance was in fraud of himself, as a creditor of the husband, for he not only consented to, but he performed the act himself.*"

That case also settles a point made in the opposing brief, (p. 9,) to wit, that Davis made his deed to Mrs. Fredericks in ignorance of the facts showing a design to defraud creditors. The court there holds that one making a conveyance such as Davis did *will be held in law* to have "*full*

knowledge of all the facts as they existed at the time," * * * "as *we are bound to presume, since he has shown nothing to the contrary.* (Grant *v.* Morse, 22 N. Y., 323.)"

The same thing, (that Davis cannot escape from his deed,) in effect, is decided in Repalli *v.* Stewart, 27 N. Y., 310.

In Baker *v.* Gilman, 52 Barb., 26, substantially the same doctrine is repeated.

The same thing is decided in Therrason *v.* Kickok, 37 Vermont, 454–464.

Substantially the same thing is held in Whiting *v.* White, 7 Minn., 345–349; also Lemay *v.* Bibeau, 2 Minn., 291.

The exact question here involved was decided in French *v.* Mehan, 56 Pa. St., 286, where the court used these words (289): "If the conveyance to the wife was intended to hinder and delay creditors, *then the grantor was a party to the fraud, and neither he nor any one claiming title under or through him ought to be permitted to allege the fraud, or derive* any advantage therefrom." This language of the court below was approved by the Supreme Court. (See p. 290.) We beg careful reference to this case.

The case of Baldwin *v.* Cawthorn, 19 Ves., 165, decided by Lord Eldon, holds, in effect, the same thing, to wit, that a party to a fraudulent assignment shall, in a court of equity, receive no relief against it.

It also decides an additional point made by appellants' brief. That brief seeks to turn the *absolute* deed of Davis to Mrs. Fredericks into a *deed in trust* for the use of her husband's creditors. Lord Eldon, in Baldwin's case, in reply to the suggestion that the fraudulent instrument ought to be, in the interest of the parties to it, reformed into a *mortgage* for their benefit, said: "The question with reference to that is whether, all the parties having agreed, with fraudulent purpose, that this instrument shall, on the face of it, be an *absolute* deed, meaning, therefore, that it never shall be producible as a mere *mortgage*, a court of equity will, *at the instance of those who, with a fraudulent view, made it an*

absolute instrument, correct it and make it a mere security. That I do not conceive was *ever done* upon such grounds; and therefore I think the decree right."

In Oliver *v.* King, 35 Eng. Law. & Eq., 312, the court holds the same thing, and that a creditor by whose concurrence a deed, alleged to be voluntary and fraudulent, was made, shall not be "permitted to say that the deed thus executed, with his full consent and concurrence, was a fraud upon *him* within the meaning of the provisions of the statute of 13 Eliz., c. 5."

The same thing is, in substance, in the case of Steel *v.* Brown, 1 Taunton, 380.

There is not in existence a case which sanctions the position which Davis's cross-bill places him in, and which seeks to have a deed by himself made absolute, unconditional and warranting title to his grantee, set aside in a court of equity, or reformed into one in trust in the interest of him, the fraudulent grantor, as a creditor.

The claim of the opposing brief, that Davis did not *know* the husband's fraudulent intent in ordering the conveyance to his wife, is answered completely by what is said by the Court of Appeals above quoted from 36 N. Y., 414.

It is also answered by the following, which we quote from the opinion of the court below: (R. 79, 80.) "Davis had previously testified that W. A. Fredericks was the real owner of the undivided one-half of the mill conveyed by him to plaintiff; that Davis was the trustee of Fredericks, holding this title for him; that at the time of this conveyance Fredericks was largely indebted to Davis and others, and was insolvent. He offered further to prove not only that Fredericks was the real owner of the property, but that he paid the consideration therefor mentioned in the bill of sale. It therefore appears that Davis, at the time of the conveyance to plaintiff, knew that she had no interest in the property conveyed, and that, as to creditors, such conveyance was fraudulent and void, and with this knowl-

edge he promised to warrant and defend her title to the property."

The opposing brief seems to rely somewhat upon the idea that Davis's cross-bill was one filed in the interest of W. A. Fredericks's creditors, as distinguished the interest of said Davis.

No creditor of Davis is in court contesting with Mrs. Fredericks the validity of her title, save Davis. Davis's case will not be helped out by any vicarious merits he may seek to get for it by virtue of the fiction that *other creditors* than himself are here seeking to get clear of what Davis sets up virtually as his own fraud.

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